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No. ① 09-487

Supreme Court, U.S.
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In The

Supreme Court of the United States

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ARKANSAS DAIRY
COOPERATIVE ASSOCIATION, et al.,

Petitioners,

v.

DEPARTMENT OF AGRICULTURE, et al.,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

◆

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 608c, authorizes the Secretary of Agriculture to promulgate marketing orders to regulate prices for milk and other commodities in regional marketing areas. The Secretary has currently designated ten such regional milk marketing areas which encompass only a part of the nation. The Food, Conservation, and Energy Act of 2008 (FCEA), amended the AMAA[1] and specifically requires the Secretary of Agriculture to "determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area" and consider those as to whether or not he adjusts make allowances used in the minimum pricing formulas. In 2008 the Secretary adjusted make allowances for ten designated marketing areas, but denying the FCEA amendments applied, made no such determination or consideration. The Court of Appeals held the FCEA did apply. Rather than return the matter to the agency to comply, that court found and resolved an ambiguity. Specifically, the court reasoned that the Secretary could, even though it had not, define "relevant marketing area" to be the entire country despite the fact that the Secretary's milk marketing orders are defined by regulation and there exists no national marketing area under the AMAA.

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[1] 7 U.S.C. § 608c(17)(G).

QUESTIONS PRESENTED FOR REVIEW – Continued

1. Can the Court of Appeals *sua sponte* create a *post hoc* rationale, never advanced by the agency, which, *inter alia,* finds and resolves an ambiguity rather than leaving that to the agency?

2. Can a court define a "relevant marketing area" under the AMAA when Congress has given that authority expressly to the Secretary of Agriculture?

3. Does the AMAA authorize a national marketing area for milk that includes regions not subject to any marketing orders in conflict with this Court's and other circuits' definition of marketing areas?

LIST OF PARTIES

Petitioners herein, the plaintiffs and appellants below, include the following persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, nonwholly owned subsidiaries or other legal entities who or which are financially interested in the outcome of the litigation: Arkansas Dairy Coop. Assoc., Inc., Central Sands Dairy, LLC, Columbia River Dairy, LLC, Continental Dairy Products, Inc., Dairy Producers of New Mexico, Lone Star Milk Producers, Inc., Maryland and Virginia Milk Producers Coop. Assoc., Select Milk Producers, Inc., United Dairymen of Arizona, and Zia Milk Producers, Inc. They will be referred to as "Dairy Farmers" in the case.

The Respondent, Defendant and Appellee below, is the United States Department of Agriculture and Intervening Defendants and Appellees below: International Dairy Foods Association, Agri-Mark, Inc., Associated Milk Producers, Inc., Foremost Farms USA Cooperative, Land O' Lakes, Inc., Michigan Milk Producers Association, and Northwest Dairy Association.

CORPORATE DISCLOSURE STATEMENT

The Appellants herein are associations of dairy farmers and individual dairy farm operations and none have any parent companies. No publicly held company has a 10% or greater ownership interest in any of the appellants. The principal business of the appellants is the production of milk and cooperative marketing of that milk to dairy product manufacturers and bottling plants.

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PETITION FOR A WRIT OF CERTIORARI

Arkansas Dairy Cooperative Association and the other named Petitioners respectfully petition for a writ of certiorari to the United States Court of Appeals for the Circuit for the District of Columbia to resolve a conflict with holdings of this Court, conflicts among the circuits, and to answer a question of great import.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit (Rogers, Tatel, and Griffith, Circuit Judges) is reported at *Ark. Dairy Co-op. Assn., Inc. v. U.S. Dept. of Agric.*, 573 F.3d 815 (D.C. Cir. 2009), *infra*, App. 1.

The decision of the district court is found at *Ark. Dairy Co-op. Assn., Inc. v. U.S. Dept. of Agric.*, 576 F. Supp. 2d 147 (D.D.C. 2008) (Sullivan, J.), *infra*, App. 48.

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JURISDICTION

The decision and order of the United States Court of Appeals for the District of Columbia was issued on July 24, 2009 and no party sought reconsideration or moved for a hearing *en banc*. *Infra*, App. 46. This petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the decision of the Court of Appeals. The statutory basis for the issuance of this writ is 28 U.S.C. § 1254(1).

The court of appeals had jurisdiction over this case under 28 U.S.C. § 1291. It affirmed a decision of the district court which had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) because the claim arose under the laws of the United States (to wit, 7 U.S.C. § 608c), and pursuant to 28 U.S.C. § 1346 because an officer and agency of the United States was a proper party defendant.

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STATUTORY PROVISIONS INVOLVED

Food, Conservation, and Energy Act of 2008, § 1504(G), Pub. L. No. 110-246, 122 Stat. 1664, 1721 (2008) (codified at 7 U.S.C. § 608c(17)(G)).

> (G) MONTHLY FEED AND FUEL COSTS FOR MAKE ALLOWANCES. – As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall –
>
> (i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;
>
> (ii) consider the most recent monthly feed and fuel price data available; and
>
> (iii) consider those prices in determining whether or not to adjust make allowances.

The entirety of 7 U.S.C. § 608c is set forth at App. 86.

The pertinent text of the Secretary's decision and regulations at issue, 73 Fed. Reg. 35306 (June 20, 2008), is set forth at App. 78.

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STATEMENT OF THE CASE

This case arises out of a challenge by Dairy Farmers to a USDA regulation which raised "make allowances" in milk order pricing formulas. Make allowances represent the cost and return of a theoretical plant manufacturing a commodity. Higher make allowances result in lower producer prices, and thus Dairy Farmers challenged the legality of the USDA make allowance increases.

This case presents the question of whether the Court of Appeals exceeded the limits of judicial review by *sua sponte* supplying a *post hoc* rationale regarding the Secretary's compliance with FCEA amendments which required certain determinations and considerations of producer costs when he raised the plant make allowances. The Secretary provided neither the determination nor the consideration, but, rather, claimed that the FCEA did not apply to this hearing.

The USDA issued these regulations pursuant to the AMAA which authorizes the Secretary to promulgate orders regulating the prices of milk sold in regional milk marketing areas.[2] There are now ten such milk marketing areas, defined by regulation,[3] covering only portions of the United States.[4]

Plants subject to these milk marketing orders pay minimum prices based on use and producers receive minimum prices regardless of use. This Court has described the general operation of these milk orders.[5] Regulations detail formulas to compute minimum prices plants must pay for milk.[6] Three variables are used in computing these prices – product prices, yields, and make allowances. Product prices change monthly based on market prices. Yields and make allowances are set by rule.

The FCEA amendments were preceded by another challenge to changes to make allowances. In a 2006 rulemaking, the Secretary increased the make allowances. Some producers, including some but not all of the Petitioners herein, challenged the decision claiming, *inter alia,* that the AMAA required the Secretary to consider the costs of feeds in the marketing order in making the changes, which he did not. That court found it unnecessary to decide whether § 608c(18) required the Secretary to consider such feed costs when amending make allowances because the Secretary's final decision showed he had, in fact, "given [these factors] appropriate consideration" under the product-price formulas.[7]

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[2] 7 U.S.C. § 608c(11)(A).

[3] 7 C.F.R. § 1001.2, 7 C.F.R. § 1005.2, 7 C.F.R. § 1006.2, 7 C.F.R. § 1007.2, 7 C.F.R. § 1030.2, 7 C.F.R. § 1032.2, 7 C.F.R. § 1033.2, 7 C.F.R. § 1124.2, 7 C.F.R. § 1126.2, 7 C.F.R. § 1131.2.

[4] Federal Milk Marketing Order Areas, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateS&navID=MapFederalMilkMarketingOrdersDairyLandingPage&rightNav1=MapFederalMilkMarketingOrdersDairyLandingPage&topNav=&leftNav=CommodityAreas&page=FederalMilkMarketingOrdersMap (October 20, 2009).

[5] *See, e.g. Zuber v. Allen*, 396 U.S. 168, 172-179 (1969).

[6] 7 C.F.R. § 1000.50.

While *Bridgewater Dairy* case was still pending, the Secretary announced the commencement of a new hearing process to consider further, broader, changes to the pricing formulas including more changes to the make allowances. He designated the orders covering the ten milk marketing areas as subject to the rulemaking process.[8]

While a decision on this second rulemaking hearing was pending, Congress amended the AMAA in response to the *Bridgewater Dairy* decision and imposed additional, more precise, requirements on the Secretary regarding consideration of producer costs of feed and fuel when make allowances were being changed. This provision in the Food, Conservation, and Energy Act of 2008 (FCEA) required that when the Secretary changed make allowances he was required to "determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area."[9] Once determined, he was to consider those costs.[10] Rather than indirect annual projected costs in an economic model, the FCEA required "the most recent monthly feed and fuel price data available."[11]

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[7] *Bridgewater Dairy, LLC v. U.S. Dept. of Agric.*, No. 3:07-cv-104, 2007 WL 634059, at *4-6 (N.D. Ohio Feb. 22, 2007).

[8] 72 Fed. Reg. 6179 (February 9, 2007). 72 Fed. Reg. 7753 (February 20, 2007).

These amendments to the AMAA added specific producer economic factors into the Secretary's decision of whether or not to raise the make allowances for plants.

After FCEA took effect, USDA issued a Tentative Decision which raised the make allowances in the orders for all ten Federal milk marketing orders.[12] Though the Secretary took official notice of data regarding make allowance studies,[13] he took no such notice to any monthly average data regarding the producer costs of feed or fuel. The Secretary did not acknowledge the FCEA amendments, made no determination of the current costs of feed or fuel in the relevant marketing orders and, otherwise, did not consider them.

There are no feed or fuel costs for the milk marketing areas designated by the Secretary under the AMAA. The subagency at USDA that administers the milk marketing orders is the Agricultural Marketing Service (AMS). The Economic Research Service (ERS), a separate agency within USDA, estimates the monthly costs of production for 23 states, as well as a national average.[14] The USDA National Agricultural Statistics Service (NASS) also compiles data regarding feed prices and fuel prices.[15] The presiding Administrative Law Judge took official notice of these and other statistics during the administrative hearing. But the data noticed, including those for feed, fuel, and costs of production do not correspond to the milk marketing areas as defined by regulation. For example, at least two of the 23 monitored states, California and Idaho, which comprise part of the national average, represent almost one fourth of national milk production but are not part of any federal milk marketing areas. The Secretary did not utilize the data in the record to determine and consider the actual costs in the marketing areas as required by the FCEA.

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[9] 7 U.S.C. § 608c(17)(G)(i).

[10] 7 U.S.C. § 608c(17)(G)(iii).

[11] 7 U.S.C. § 608c(17)(G)(ii).

[12] 73 Fed. Reg. 35306 (June 20, 2008).

[13] *Id.* at 35324, footnotes 1-5.

Marketing areas generally include multiple states in whole or in part. For example the Northeast

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[14] ERS Commodity Costs and Returns: U.S. and Regional Cost and Return Data, Monthly Milk Costs of Production, http://www.ers.usda.gov/Data/CostsAndReturns/TestPick.htm#milkproduction (October 20, 2009).

[15] National Agricultural Statistics Service, Agricultural Prices, http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1002 (October 20, 2009).

Marketing Area encompasses portions of 11 states.[16] Not all of those states are in the ERS data. The ERS also does not have partial state data such as that found in eastern Pennsylvania. Only Arizona is completely within a marketing area and no other marketing area is in the state.[17] There is no ERS cost of production data for Arizona.

The Secretary said expressly that he would not consider the costs of feed and fuel when he said

> These [arguments regarding costs of production of milk] *are not valid arguments for opposing* how make allowances should be determined or what levels make allowances need to be in the Class III and Class IV product-pricing formulas.[18] [Emphasis added.]

Accompanying the Final Decision was an Economic Analysis[19] that used an econometric model to estimate the economic impact of the proposed rule change into the future on an annual basis. USDA does not use or even reference this analysis in its

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[16] 7 C.F.R. § 1001.2.

[17] 7 C.F.R. § 1131.02.

[18] 73 Fed. Reg. 35324, *infra*, App. 83.

[19] USDA Agricultural Marketing Service (AMS) Economic Analysis Class III and IV Pricing Formulas Tentative Partial Final Decision March 2008, http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5070137 (October 20, 2009).

Findings and Conclusions that lead to the make allowance changes.[20]

In summary the decision designated ten milk marketing areas, made no determination of average monthly costs of feed and fuel in those marketing areas, and expressly said USDA would not consider such costs in deciding whether or not to raise make allowances.

The increased make allowances further eroded producer prices. Dairy Farmers, Petitioners, brought suit in the United States District Court for the District of Columbia seeking injunctive relief.[21] Among the claims made was that the failure of USDA to comply with the newly enacted FCEA by neither determining the producer feed and fuel costs in the relevant marketing areas nor considering them.

During the course of proceedings in that court the USDA did not argue that it had made the determinations and considerations but, instead, that the FCEA did not apply to this hearing. The trial court denied the request for a preliminary injunction holding that the producers had no standing to bring a claim under the AMAA,[22] but, if they did have standing, the FCEA did not apply to this hearing.[23]

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[20] 73 Fed. Reg. 35308, *et seq.*

[21] *Ark. Dairy Co-op. Assn., Inc. v. U.S. Dept. of Agric.*, 576 F.Supp.2d 147, 150 (2008), *infra*, App. 47-48.

The Dairy Farmers appealed to the Circuit Court for the District of Columbia. That court reversed the trial court on the issue of standing and also held that the Secretary was obligated to comply with FCEA amendments. It also held that "even though the proposed rule did not explicitly purport to do so in fulfillment of the requirements of § 608c(17)(G)(i), or indeed mention that provision at all" the Department, nonetheless complied with the FCEA amendment.[24] It held that the determination of current feed and fuel costs was met by the projected costs implicit in the national economic analysis.[25]

It went on to hold that "The Secretary complied as well with his obligation to determine those costs in 'the relevant marketing area.' "[26] It held that the term of art, "marketing area," was rendered ambiguous because it was modified by "relevant." The ambiguity thus created did not restrict the Secretary to look among the ten marketing areas individually or together, but that the Secretary could redefine the term for this subsection to include the entire nation, including large production areas not subject to Federal milk marketing orders. Although USDA had never found nor settled this ambiguity, the Court of Appeals went on to do so explaining that since the USDA had held that commodities moved in a national market that was "the relevant marketing area."[27]

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[22] *Id.* at 156, *infra*, App. 63.

[23] *Id.* at 160, *infra*, App. 74.

[24] *Ark. Dairy Co-op Assn., Inc. v. U.S. Dept. of Agric.*, 573 F.3d 815 (D.C. Cir. 2009). App., *infra*, 1a.

[25] *Id.* at 830, *infra*, App. 34.

[26] *Id.*, *infra*, App. 33.

> In using the term "relevant marketing area," Congress did not indicate an intention to forbid that long-standing practice, but instead to invoke the Secretary's expertise. Given the broad statutory phrase, it was reasonable for the Secretary to determine producer costs on a nationwide basis, where he has determined the nationwide market is the relevant area.[28]

Throughout the proceedings USDA never argued that the marketing area under the FCEA was national as opposed to the marketing areas in the rulemaking individually or collectively. It is only the Circuit Court's analysis, particularly its finding a national marketing area that provides the basis for the questions presented in this petition.

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REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals conflicts with holdings of this Court because it answered an ambiguity in the statute which the agency had refused to consider in the first place. This Court has long cautioned against courts providing rationale for agency actions.

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[27] *Id.*, App. 33-34.

[28] *Id.*, App. 34.

> We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.[29]

Similarly, the Court has not looked with favor on *post hoc* rationale given by agencies.

> The short-and sufficient-answer to petitioners' submission is that the courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, *on the basis articulated by the agency itself.*[30] [Emphasis in original.]

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[29] *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

[30] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), *citing, Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

Further, because the USDA denied that the FCEA applied to the rulemaking, let alone complied with the FCEA amendments, it has "entirely failed to consider an important aspect of the problem."[31] The Circuit Court could not, on its own, find ambiguity in the phrase "relevant marketing area" and then provide its answer. Congress delegated that authority to the agency, not the court, to do. The agency did not do so. The term "market area" did not lose its AMAA characteristics by the adjective "relevant." The ambiguity was not between a marketing area within the ambit of the AMAA or not, rather which of the already designated marketing areas or groups of areas were relevant to determine producer costs of production when weighing whether or not to raise plant make allowances. USDA had designated ten marketing areas for the proceedings.

The danger in courts treading where agencies are designed to go, is evidenced by the Circuit Court's very definition of "marketing area." It is a definition inconsistent not only with agency use of the term but directly conflicts with this Court's use of the term in marketing orders. For example, in *H.P. Hood & Sons, Inc. v. Du Mond*,[32] this Court described the nature of milk orders as being regional. That case involved a state marketing order, but this Court analogized the different marketing areas within the state with the federal when it said,

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[31] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

[32] *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

> In determining whether a milk market is 'adequately served,' the state follows a plan similar to the federal law in that both divide the country into 'marketing areas.'[33]

The marketing areas are defined by regulation promulgated by the Secretary after a hearing. These marketing areas are not defined on a case by case nor does the Secretary reconsider their bounds every time it proceeds to amend terms of the order. The boundaries of the marketing areas were not subjects of the challenged rulemaking.

The Secretary cannot define a national marketing area under the AMAA. The AMAA specifically requires that the Secretary keep the marketing areas as small as possible.[34]

> (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the

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[33] *Id.* 306 U.S. at 546-547.

[34] 7 U.S.C. § 608c(11).

> commodity or product would not effectively carry out the declared policy of this chapter.[35]

Without a national marketing area there is no data on costs in the marketing area. The data in the Economic Analysis used by the Secretary does not represent the marketing area data. Similarly, the 23 state and national cost of production reports of ERS do not correspond to the marketing areas the Secretary has administratively defined. For example, the national marketing area identified by the Court of Appeals includes Nevada which, by law, cannot be part of any marketing area.[36]

In interpreting the FCEA, the term "marketing area" must be read in the context of the statute.[37] This Court has held, "To determine whether [a regulation] is a valid exercise of the Secretary's authority, we must consult the Act, viewing it as a 'symmetrical and coherent regulatory scheme.'"[38] The Congressional amendments to the AMAA in the FCEA used the term "marketing area" which was already used twenty-four other times within the AMAA. In none of those uses, no regulations promulgated under the act, and, heretofore, no case, has referenced those marketing areas as nationwide marketing areas.

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[35] 7 U.S.C. § 608c(11)(A).

[36] 7 U.S.C. § 608c(11)(D).

[37] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[38] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

Similarly, the circuits who have had the opportunity to address the issue have described the marketing areas as only regional.

First Circuit: ("To this end, the Secretary divided the country into regions, each of which is known as a federal order milk marketing area.")[39]

Second Circuit: ("The Act also provides for the promulgation by the Secretary of regulations called 'marketing orders' which govern marketing of milk in various geographical areas of the United States. . . .")[40]

Fifth Circuit: ("The nation is divided into more than 40 marketing areas . . . ")[41]

Sixth Circuit: ("Under the AMAA, the Secretary is given the authority, and the responsibility, to formulate and administer federal milk marketing regulations in various regions throughout the United States.")[42]

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[39] *Grant's Dairy – Maine, LLC v. Commr. of Maine Dept. of Agric., Food & Rural Resources,* 232 F.3d 8, 12 (1st Cir. 2000).

[40] *Dairylea Co-op., Inc. v. Butz*, 504 F.2d 80, 85 (2nd Cir. 1974).

[41] *Gore, Inc. v. Glickman,* 137 F.3d 863, 865 n.2 (5th Cir. 1998).

[42] *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1344 (6th Cir. 1994).

Seventh Circuit: ("The country is divided into regional milk-marketing areas, which are governed by different milk-marketing orders.")[43]

Eighth Circuit: ("The Act recognizes that the factors which affect the problem vary in different production and marketing areas and that the question therefore is one that must be dealt with regionally on the basis of the particular conditions.")[44]

Ninth Circuit: ("To implement this system, the Secretary has divided the country into Milk Marketing Areas, each governed by a separate milk order.")[45]

District of Columbia Circuit: (The AMAA " . . . empowered the Secretary of Agriculture to regulate the sale of milk by geographic region. Over the years, the Secretary issued many milk marketing orders, applying to different geographic regions and classifying milk according to the 'form in which or the purpose for which it is used.' ")[46]

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[43] *White Eagle Co-op. Ass'n v. Conner*, 553 F.3d 467, 471 (7th Cir. 2009).

[44] *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87, 90-91 (8th Cir. 1946).

[45] *United Dairymen of Ariz. v. Veneman*, 279 F.3d 1160, 1162 (9th Cir. 2002).

[46] *Hershey Foods Corp. v. Dept. of Agric.*, 293 F.3d 520, 521 (D.C. Cir. 2002) (internal citations omitted).

This question is of great national importance. Federal milk marketing orders are the cornerstone of national policy regarding a consistent supply of a good and wholesome product. In 2008 USDA under these regulations set the prices for 44.1 billion[47] of the 55.14 billion pounds of milk processed and sold as fluid or beverage milk in the United States.[48] Approximately 85% of the nation's licensed dairy farms participate in the milk marketing pools which exceeded $20 billion in 2008.

The statutory authority for market orders extends to other commodities. In addition to the ten milk marketing orders promulgated under the AMAA, there are 36 other orders covering vegetables, nuts, fruits, and herbs.[49] Compliance with statutory requirements by USDA is equally important to the growers and marketers of those covered commodities.

The issue first arose in the Court of Appeals decision. It not only has an impact on this case, but would become part of discussions of marketing order decisions not only in changing make allowances in

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[47] Agricultural Marketing Service, Industry Marketing and Promotion, Milk Marketing and Utilization Summaries, Annual 2008.

[48] *Dairy Products 2008 Summary,* Agricultural Statistics Board NASS, USDA May 2009, page 51, http://future.aae.wisc.edu/collection/dairyproductsreport/DairProdSu_2008_13.pdf (October 15, 2009).

[49] 7 C.F.R. Parts 905-996.

FMMOs but also in other commodity marketing orders.

◆

CONCLUSION

The Dairy Farmers respectfully request that this Court grant the petition and issue a writ of certiorari to the Circuit Court for the District of Columbia to answer the questions raised in this petition.

Dated: October 22, 2009

Respectfully submitted,

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573 F.3d 815

United States Court of Appeals,
District of Columbia Circuit.
ARKANSAS DAIRY COOPERATIVE
ASSOCIATION, INC., et al., Appellants
v.
UNITED STATES DEPARTMENT OF
AGRICULTURE, et al., Appellees.
No. 08-5406.

Argued April 7, 2009.
Decided July 24, 2009.

Appeal from the United States District Court for the District of Columbia (No. 1:08-cv-01426-EGS).

Benjamin F. Yale argued the cause for appellants. With him on the briefs was Ryan K. Miltner.

John H. Vetne and Steven J. Rosenbaum argued the cause for appellees Agri-Mark, Inc., et al. and International Dairy Foods Association. Susan C. Silber entered an appearance.

Kelsi Brown Corkran, Attorney, U.S. Department of Justice, argued the cause for federal appellee. With her on the brief were Gregory G. Katsas, Assistant Attorney General, and Michael S. Raab, Attorney.

Before: ROGERS, TATEL and GRIFFITH, Circuit Judges.

Opinion for the Court by Circuit Judge ROGERS.

Opinion by Circuit Judge GRIFFITH dissenting in part and concurring in the judgment in part.

ROGERS, Circuit Judge:

The Secretary of Agriculture establishes formulas to calculate the minimum prices that dairy handlers (processors, manufacturers, and distributors) must pay dairy producers (farmers) for milk. 7 U.S.C. § 608c(5). As part of those formulas, the Secretary sets "make allowances," which represent the costs to handlers in making certain forms of dairy products. In July 2008, the Secretary promulgated an interim rule amending milk marketing orders to increase make allowances, thereby reducing the minimum price paid to producers. Several producers and producer cooperatives challenged the increases principally on the ground that the Secretary had failed to determine and consider their food and fuel costs, which they maintain was required by the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. §§ 601, et seq. The district court ruled the producers lacked standing for want of a cause of action and, alternatively, denied their motion for a preliminary injunction. We hold that the producers have standing to challenge the interim rule under the Administrative Procedure Act and that the Secretary was obliged under the AMAA to consider their feed and fuel costs. Because the Secretary met that obligation, however, the producers fail to show likelihood of success on the merits, and we affirm the denial of injunctive relief. Furthermore, in reaching that decision, we hold certain of their claims must be dismissed.

I.

The milk industry is highly regulated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601, et seq. ("AMAA"). *See Hettinga v. United States,* 560 F.3d 498, 501 (D.C.Cir.2009). At least two factors create variations in the supply and demand of milk. First, the dairy market values milk more highly when sold in fluid form than when used for dairy products like butter or cheese, which would encourage dairy farmers in an unregulated market to sell their milk for the premium fluid prices. *See Zuber v. Allen,* 396 U.S. 168, 172-73, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). Second, cows naturally produce more milk in the spring and summer, such that a herd size sufficient to generate an adequate supply during the fall and winter generates surpluses during the spring and summer, leading to the potential for further price swings in an unregulated market. *See id.* To prevent "destabilizing competition" among dairy farmers as a result, Congress enacted the AMAA. *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 341-42, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). "The 'essential purpose [of the scheme put in place by the AMAA is] to raise producer prices,' and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." *Id.* (quoting S. REP. NO. 74-1011, at 3 (1935)).

The AMAA and its implementing regulations use two regulatory mechanisms: price fixing and payment pooling. The minimum prices that handlers must pay vary according to the end use of the milk, as categorized in four classes. *See* 7 U.S.C. § 608c(5)(A); 7 C.F.R. § 1000.40 (Class I milk is sold in fluid form, Class II milk is used to make ice cream, soft cheeses, and related products, Class III milk is used to produce harder cheeses, and Class IV milk is used to make butter and related products.). Instead of setting specific prices to be paid for each Class, the Secretary has established a formula by which the price for each Class is determined monthly based on the average nationwide wholesale prices from the previous month. *See* 7 C.F.R. § 1000.50; *Milk in the Northeast and Other Marketing Areas; Notice of Proposed Rulemaking and Tentative Partial Final Decision,* 73 Fed.Reg. 35,306, 35,308 (June 20, 2008) ("*Tentative Decision*"). The formulas for Class III and IV milk are based on the nationwide average prices for butter, nonfat dry milk, cheese, and dry whey, minus a set dollar amount for each of those products, multiplied by a "yield factor." 7 C.F.R. § 1000.50(*l*)-(*o*). Class I and II prices are derived from the Class III and IV prices but Class I prices are adjusted for the location of the handler so that handlers pay different prices in different geographic areas. *See* 7 C.F.R. §§ 1000.50, 1000.52. The amounts subtracted from the average sale prices of Class III and IV products, known in the milk industry as "make allowances" or "manufacturing allowances," are intended to represent the costs to the handlers of making the end dairy products from raw milk. *Tentative Decision,* 73 Fed.Reg. at 35,308.

In essence, handlers retain from the average wholesale price the amount set by the make allowance and transfer the balance to producers.

The second major component of dairy market regulation is payment pooling. Under this system, handlers pay prices according to the end use of milk, but all the producers in a geographic area receive the same monthly average or "blended" price per unit of milk sold, regardless of the use to which their milk is put. *See* 7 U.S.C. § 608(c)(5)(B); 7 C.F.R. §§ 1000.70, 1000.76. This payment equalization is accomplished through the "producer settlement fund" into which handlers pay, or from which handlers withdraw, according to whether their blend-price payments to producers are less or greater than the end-use-value of the milk they have purchased. 7 C.F.R. §§ 1000.70, 1000.76. Again, the effect of this regime is that handlers make payments which vary according to the market value of the milk they use (as reflected in minimum prices), while all producers in an area receive the same average, or blended, price per unit of milk.

Different geographic areas of the United States are regulated under slightly different conditions, although the formulas used to set prices of Class III and IV milk are the same in all areas. *See* 7 C.F.R. § 1000.50. Each of eleven areas, generally known as a "marketing area" or "milk marketing area," is governed by a different "Order" of the Secretary. *See, e.g.*, 7 U.S.C. § 608c(5)(A); 7 C.F.R. § 1001.2. Before going into effect, the Secretary's orders must be approved by two-thirds of the producers or the producers of two-thirds of the milk volume in the affected area, as well as by the handlers of a majority of the milk volume in the area covered by the order, although the Secretary can put an order into effect without handler approval if the order is "the only practical means of advancing the interests of the producers." 7 U.S.C. § 608c(8)-(9).

Make allowances, unlike the wholesale prices used in the minimum price formulas for Class III and IV products, do not vary with market conditions. They are set as constants in a formula and can only be raised or lowered through a rulemaking. *Tentative Decision,* 73 Fed.Reg. at 35,323. Several events converged to shape the issues in the instant case. First, in January 2006, the Secretary issued notice of a hearing on a proposal in which the handler Agri-Mark advocated an increase in make allowances. *See Milk in the Northeast and Other Marketing Areas; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders,* 71 Fed.Reg. 545 (Jan. 5, 2006). In December 2006, after a hearing and the required producer approval, the Secretary promulgated an interim final rule increasing the make allowances. *See Milk in the Northeast and Other Marketing Areas; Interim Order Amending the Orders,* 71 Fed.Reg. 78,333 (Dec. 29, 2006). A number of producers sought an injunction in the district court for the Northern District of Ohio, on the ground that the Secretary had failed to consider their feed prices and feed supplies when adjusting the make allowance, as they argued was required by the AMAA, 7 U.S.C. § 608c(18), *infra* note 7. The district court set forth conflicting interpretations, noting, for example, that the Sixth Circuit had held in *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1355 (6th Cir.1994), that the statute and legislative history were ambiguous. The district court found it unnecessary to decide whether § 608c(18) required the Secretary to consider such feed costs when amending make allowances because the Secretary's final decision showed he had, in fact, "given [these factors] appropriate consideration" under the product-price formulas. *Bridgewater Dairy, LLC v. USDA,* No. 3:07-cv-104, 2007 WL 634059, at *4-6 (N.D.Ohio Feb. 22, 2007).

Second, in 2008 Congress amended the AMAA to require the Secretary, as "part of any hearing" to adjust make allowances, to "determine" and "consider" producers' feed and fuel costs.[1] *See* 2008 Act, Pub.L. 110-246, § 1504, 122 Stat at 1721-72 (codified at 7 U.S.C. § 608c(17)(G)), *see* page 22. The amendment addressed ambiguities in § 608c(18) noted by the district court in *Bridgewater Dairy.* Under the amendment, the requirement to consider producers' costs explicitly applied when the Secretary was adjusting make allowances, and the Secretary was required to consider recent price in determining producers' monthly costs in the market area.

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[1] On May 22, and June 18, 2008, Congress enacted two statutes, together known as the Food, Conservation, and Energy Act of 2008, Pub.L. 110-234, 122 Stat. 923; Pub.L. No. 110-246, 122 Stat. 1651 ("2008 Act"). Section 1504 of Pub.L. No. 110-246, which contains the requirement relevant in the instant case, became effective on the earlier of its enactment or the enactment of "H.R. 2419 of the 110th Congress." *See* 2008 Act § 4(b), 122 Stat. at 1664. H.R. 2419, which became Pub.L. No. 110-234, was enacted earlier, on May 22, 2008. *See* 2008 Act, 122 Stat. at 923.

Third, the Secretary, on June 20, 2008, after a series of hearings, proposed further increases in make allowances and changes in the butter fat yield factor used in Class III and Class IV product-price formulas on an interim basis. *Tentative Decision,* 73 Fed.Reg. 35,323.[2] As relevant, the Secretary found that handlers' costs had increased since the make allowances were last set. *Id.* at 35,324. The Secretary pointed out that "because make allowances account for manufacturing costs in the Class III and Class IV price formulas but do not change as those costs change, increasing make allowances is the only reasonable way by which those increased costs can be recovered," *id.* at 35,323. The Secretary also cited testimony indicating that a 2006 study had attempted to correct the understatement of processing costs in a 2005 study used in the previous rulemaking, and the 2006 study showed the need to update make allowances to reflect changes in manufacturing costs. *Id.* at 35,309. The Secretary proposed increased make allowances for Classes III and IV based on national manufacturing cost averages. *Id.* at 35,325-26. In the course of the rulemaking, the Secretary addressed a number of objections from producers, including that make allowances were already set too high and that producers have also seen increased costs due to higher energy and feed costs. *Id.* at 35,324. The Secretary responded that objections based on producer costs "are not valid arguments for opposing how make allowance should be determined or what levels make allowances need to be," because current make allowances were not reflective of handlers' costs and, unlike producers' costs, could not be recaptured in the marketplace. *Id.*

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[2] The Secretary explained in promulgating an interim rule that "[a] separate decision [will address] the collection of manufacturing cost information, the use of an energy cost adjustor and providing for a cost add-on feature to Class III and Class IV product-pricing formulas. . . ." *Tentative Decision,* 73 Fed.Reg. at 35,306.

After producer approval of the *Tentative Decision*, the Secretary promulgated an interim rule amending milk marketing orders to increase the make allowances. *See Milk in the Northeast and Other Marketing Areas; Interim Order Amending the Orders,* 73 Fed.Reg. 44,617 (July 31, 2008) ("*Interim Rule*"). The required majority of handlers did not approve, but the Secretary exercised his override authority on the ground that the *Interim Rule* was necessary to effect the policy of the AMAA of advancing producer interests. *Id.* at 44,618. Neither the *Tentative Decision* nor the *Interim Rule* explicitly addressed the requirements of the 2008 Act.

Two weeks later, appellant-producers sued the Department of Agriculture, seeking declaratory and injunctive relief on the ground that the *Interim Rule* was arbitrary, capricious, and contrary to law, not supported by substantial evidence, and constituted a denial of substantive due process. The producers premised the district court's jurisdiction on the AMAA, including the amendment in the 2008 Act, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq. They alleged that the *Interim Rule* would have an adverse "direct, penny for penny, impact on the prices" producers would receive for their milk, specifically that it would lead to a "permanent loss of income." Compl. ¶¶ 15-17, 26. Among other grounds, they argued the Secretary had failed to determine and consider their feed and fuel costs as required by the AMAA under §§ 608c(17)(G) and 608c(18). They also filed a motion for a temporary restraining order and/or preliminary injunction.

The district court ruled the producers lacked standing because the AMAA impliedly precluded APA review, and thus they had no cause of action. *Ark. Dairy Coop., Inc. v. USDA*, 576 F.Supp.2d 147, 154 (D.D.C.2008). Alternatively, the district court denied their motion for a preliminary injunction, assuming the motion was properly before it, on the grounds that the producers had little chance of success on the merits because § 608c(18) did not require the Secretary to consider feed and fuel costs when adjusting a make allowance; the requirement in § 608c(17)(G) did not go into effect until after the hearing on proposals resulting in the Secretary's *Tentative Decision* had concluded; and the Secretary had in fact determined and considered producer costs by using product-pricing formulas that accounted for those factors. *Id.* at 156-60.

II.

The producers appeal, *see* 28 U.S.C. § 1292(a)(1), contending they have demonstrated their entitlement to a preliminary injunction of the *Interim Rule*. They contend they have a judicially protectable right in the benefits guaranteed by the AMAA and that the Secretary failed to comply with § 608c(17)(G) mandating the determination and consideration of their feed and fuel costs in adjusting make allowances, and § 608c(18) mandating the consideration of the enumerated economic factors in each marketing area. They further contend they have demonstrated irreparable harm and that an injunction in their favor is in the public interest in preventing unauthorized administrative action and direct injury to them.

In deciding whether to grant a preliminary injunction, the district court must evaluate whether: (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public interest. *Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1318 (D.C.Cir.1998). This court "review[s] the district court's weighing of the preliminary injunction factors under the abuse of discretion standard, and its findings of fact under the clearly erroneous standard. To the extent the district court's decision hinges on questions of law, however, this court's review is essentially *de novo.*" *Id.* at 1318 (citations and internal quotations omitted). There are three such questions here: (1) whether the producers have a cause of action under the APA and thus have standing; (2) if so, whether the Secretary's statutory obligations are as the producers contend; and (3) if so, whether the Secretary complied with those obligations in promulgating the *Interim Rule*.

The threshold issue is whether the producers have a cause of action by which they can challenge the *Interim Rule* amending the Secretary's milk marketing orders to increase make allowances. Our inquiry here is not whether the producers have standing under Article III of the Constitution, which is undisputed and clear, but whether Congress has provided for or precluded judicial review. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 96-97, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

The AMAA provides for handlers to petition for judicial review of the Secretary's orders after exhausting their administrative remedies.[3] No provision of

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[3] Section 608(c)(15) provides:

> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that such order . . . is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing. . . . After such hearing, the Secretary

(Continued on following page)

the AMAA provides for judicial review by producers. However, the producers also bring their claims under the APA, which provides judicial review to persons "suffering legal wrong because of [final] agency action, or adversely affected or aggrieved by [final] agency action within the meaning of a relevant statute," 5 U.S.C. §§ 702, 704, except where such review precluded by statute, *id* § 701(a)(1). The Department and some intervenor producer-handlers maintain the AMAA is such a statute, relying on *Block v. Community Nutrition Institute,* 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The district court agreed. *Ark. Dairy,* 576 F.Supp.2d at 154-55. Such an approach, however, reads *Block* too broadly and *Stark v. Wickard,* 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), on which the producers rely, too narrowly, and thus fails to conform to this court's precedent on producer standing.

In *Block,* individual milk consumers challenged a milk marketing order that had the effect of raising the price consumers would pay for reconstituted milk. *Id.* at 343-44, 104 S.Ct. 2450. The Supreme Court held the consumers lacked standing to challenge the

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> shall make a ruling upon the prayer of the petition which shall be final, if in accordance with law.
>
> (B) The District Court[s] . . . in any district in which such handled is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling. . . .

7 U.S.C. § 608(c)(15).

order. *Id.* at 352-53, 104 S.Ct. 2450. The Court instructed that in determining whether a statute "precludes judicial review," a court must examine not only the statutory text, "but also . . . the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved," *id.* at 346, 104 S.Ct. 2450, under a general presumption in favor of judicial review which "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent," *id.* at 349, 104 S.Ct. 2450. Employing this structural analysis, the Court focused on the fact that the AMAA explicitly provides handlers, but not consumers, a right to petition for review in court. The AMAA's "statutory scheme . . . [thus] makes . . . clear Congress' intention to limit the classes entitled to participate in the development of market orders." *Id.* at 346, 104 S.Ct. 2450.

Because the AMAA does not provide a right of judicial review to producers, the Department seizes on *Block* as precluding producer standing in a cause of action under the APA as well. However, this approach reads *Block* too broadly, for the Supreme Court did not concentrate simply on the presence or absence of an explicit right of appeal in the AMAA, but instead noted that in the "complex scheme" of the AMAA, there was no provision for consumer participation of any kind. *Id.* "The omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process." *Id.* Importantly, the Court contrasted this with the role of handlers and producers:

> The [AMAA] contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers – but not consumers – are entitled to participate in the adoption and retention of market orders. The [AMAA] provides for agreements among the Secretary, producers, and handlers, for hearings among them, and for votes by producers and handlers.

Id. at 346-47, 104 S.Ct. 2450. In short, "[t]he structure of th[e] [AMAA] indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized." *Id.* at 347, 104 S.Ct. 2450. Because the AMAA contemplates this active role for producers during the rulemaking process, they occupy a different status under the AMAA from that of consumers.

The Supreme Court's analysis of the purpose of the AMAA is also instructive. It observed that "preclusion of consumer suits will not threaten realization of the fundamental objectives of the statute" because "[h]andlers, like consumers, are interested in obtaining reliable supplies of milk at the cheapest possible prices." *Id.* at 352, 104 S.Ct. 2450. It contrasted this alignment of consumer and handlers interests with the interests of producers, which would not be represented by handlers. *Id.* Because producer interests would otherwise go unvindicated, the Court noted, courts have found suits by producers "necessary to ensure achievement of the [AMAA]'s most fundamental objectives – to wit, the protection of the producers of milk and milk products." *Id. See also Cmty. Nutrition Inst. v. Block,* 698 F.2d 1239, 1257 (D.C.Cir.1983) (Scalia, J., dissenting) ("The direct beneficiaries of milk marketing orders under the [AMAA] are milk producers. Even before adoption of the APA, the courts found a congressional intent to permit them to sue. But where, as in the present case, [consumers'] grievance is entirely derivative of [that of handlers,] then the statutory review provision does suggest that the more remote group was not meant to have standing to sue."). "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized." *Barlow v. Collins,* 397 U.S. 159, 167, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970). Unlike the consumers whose interests were coextensive with those of handlers in *Block,* 467 U.S. at 352, 104 S.Ct. 2450, the producers are the only party with an interest in ensuring that the price paid them is not reduced by too large a make allowance paid to handlers.

Admittedly, some discussion in *Block* seems to sweep broadly enough to exclude producer challenges to milk marketing orders. The Supreme Court stated, for example, "[W]e think it clear that Congress intended that judicial review of market[ing] orders issued under the [AMAA] *ordinarily* be confined to suits brought by handlers in accordance with 7 U.S.C. § 608c(15)." *Id.* at 348, 104 S.Ct. 2450 (emphasis added). In context, the Court's primary concern seems to have been that allowing consumer suits would permit a handler to bring suit – either in its own capacity as a consumer or through other consumers with whom its interests were aligned – without first exhausting the administrative remedy required by § 608c(15). *See id.* Because producer and handler interests are normally adverse, however, there is no such objection to producer suits because handlers "ordinarily" could not induce producers to sue on their behalf.[4]

Furthermore, reading *Block* broadly to bar producer suits like the instant one would leave no room for the Supreme Court's holding in *Stark,* 321 U.S. at 302, 311, 64 S.Ct. 559, that the district court had jurisdiction over producers' challenge to a milk marketing order claimed to exceed the Secretary's powers. Like the *Interim Rule,* the milk marketing order challenged in *Stark* computed the blend price owed to producers by first computing the use value of milk purchased by handlers (based on the minimum price and quantity for the classes of milk used), and then computing blend price as a weighted average of that use value. *Id.* at 300, 64 S.Ct. 559. The order directed that certain "adjustments" be deducted from the use value before computing the blend price. *Id.* at 301, 64 S.Ct. 559. All of these adjustments were eventually paid to producers, except for a "cooperative adjustment," which was a set amount per hundredweight of milk paid to producer cooperatives. *Id.* Because this adjustment was deducted from the total use value before the blend price was computed, the adjustment "reduce[d] *pro tanto* the amount actually received by the producers for their milk." *Id.* at 302, 64 S.Ct. 559. Producers who were not members of cooperatives challenged the order on the grounds that the AMAA did not authorize the Secretary to deduct a sum from the minimum price to be paid only to cooperatives. *Id.* at 301, 64 S.Ct. 559. Although no statute provided an explicit cause of action and the APA had not yet been enacted, the Supreme Court held that "[t]he authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents." *Id.* at 307-08, 64 S.Ct. 559. In particular, the Court concluded that the producers had a "definite and personal claim" because the AMAA assured them "minimum prices" for milk, in this instance the prices set by the use value computations without subtractions for cooperatives. *Id.* at 305, 64 S.Ct. 559. In other words, in a milk marketing order scheme like the one underlying the rule challenged in the instant case, producers had standing to obtain judicial review of an order that reduced the amount they would receive for their milk.

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[4] In fact, this court has anticipated and resolved any such risk. Where a single entity acts as a vertically-integrated "producer-handler," it must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer. *See Hettinga,* 560 F.3d at 504; *Edaleen Dairy, LLC, v. Johanns,* 467 F.3d 778, 783 (D.C.Cir.2007).

This court reaffirmed the standing of producers to challenge certain milk marketing orders in *Blair v. Freeman,* 370 F.2d 229 (D.C.Cir.1966). In *Blair,* a group of Pennsylvania producers who sold milk into the New York – New Jersey Milk Marketing Area challenged an order that provided a price increase for producers located close to New York City, but not for those located farther away. *Id.* at 234. This selective price increase was paid out of the producer settlement fund, and had the effect of reducing the pool of money to be divided as the blend price paid to all producers. *Id.* at 234 n. 15; *see also Milk in New York Metropolitan Marketing Area and in Northern New Jersey: Decision with Respect to Proposed Amendments to Tentative Marketing Agreement and to Order,* 22 Fed.Reg. 4194, 4212-14 (June 14, 1957). Because this practice, like that challenged in *Stark,* reduced "*pro tanto* the amount actually received" by the producers who brought the suit, this court held the producers had "standing to invoke the protection of equity to insure that their statutory right to minimum price protection is not being improperly diminished" by an order which "exceeded the statutory power of the Secretary." *Blair,* 370 F.2d at 234 & n. 15 (citing *Stark,* 321 U.S. at 290, 64 S.Ct. 559).

The parallels to the instant case are apparent. As in *Stark* and *Blair,* the producers challenge a rule deducting funds from the value of milk before calculating the blend price guaranteed to producers, thus reducing, "dollar for dollar," the minimum price producers are guaranteed for their milk products. Also like the producers in *Stark* and *Blair,* the producers allege not that the Secretary has misjudged what prices are appropriate, but rather that the Secretary's *Interim Rule* deducts funds, and thus reduces the blend price, in a way the Secretary is not authorized to do, namely by reducing the blend price without considering factors as he was statutorily obliged to address. As the Supreme Court stated in *Stark,* "It is because every dollar of deduction comes from the producer that he may challenge the use of the fund. The [producers'] complaint is not that their blended price is too low, but that the blended price has been reduced by a misapplication of money deducted from the producers' minimum price," i.e., from the price computed based on the use value of the milk sold. 321 U.S. at 308-09, 64 S.Ct. 559.

The Department, and some intervenor handlers, suggest that *Stark* and *Blair* are distinguishable because the money in the instant case is diverted from the producers at a different point in the payment stream than occurred in *Stark* and *Blair.* In those cases, the money was diverted from the producer settlement fund after the value of milk was calculated and after the handlers had paid for it, but before the blend price was calculated. Here, the funds are also deducted before the blend price is calculated, but, by contrast, under the *Interim Rule* the deduction occurs in the process of calculating the price owed by handlers, before the handlers pay the producers or the producer settlement fund. The importance of this difference, which the district court also emphasized, eludes us. As in *Stark* and *Blair,* the producers claim that the "minimum prices" they are owed, i.e., the value of the milk, is being reduced unlawfully under the *Interim Rule.* It is this interest which the Supreme Court in *Stark* held sufficiently "definite and personal" to permit the producers to challenge its diminution. 321 U.S. at 305, 64 S.Ct. 559. Although the producers in *Stark* and *Blair* complained of diminution of the blend price through deductions from the producer settlement fund, there is no indication that either opinion hinged on that fact. Certainly there is no indication that a diminution at a different point in the payment-calculation chain would be an alleged wrong that the APA could not address because the AMAA had impliedly precluded such a suit.

It is also unavailing for the intervenor handlers and our dissenting colleague to suggest that because the AMAA requires approval by the majority of producers before the Secretary's orders go into effect, the AMAA must be read impliedly to preclude all other avenues of redress, including suits alleging an order is not in accordance with law.

> [W]here as here the issue is statutory power to make the deduction required by the Order, . . . a mere hearing or opportunity to vote

> cannot protect minority producers against unlawful exactions which might be voted upon them by majorities. It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack on the inclusion in the Order of provisions entirely outside of the Secretary's delegated powers.

Stark, 321 U.S. at 307, 64 S.Ct. 559.[5]

All but one of the circuit courts of appeal to have considered the issue have also concluded that producers can challenge milk marketing orders under the APA, even where the challenge is not premised on a deduction from the producer settlement fund. The Sixth Circuit reasoned that "[T]he purpose of the statutory scheme – raising the price that milk producers receive for their milk – would be undermined if producers could not challenge regulations of this type in federal court. . . ." *Farmers Union Milk Mktg. Coop. v. Yeutter,* 930 F.2d 466, 467 (6th Cir.1991). Similarly, the Seventh Circuit held that producers, as "the very group the milk marketing law seeks to protect," "can seek judicial review of milk marketing orders that pinch them," *Alto Dairy v. Veneman,* 336 F.3d 560, 566, 569 (7th Cir.2003). *See Dairylea Coop., Inc. v. Butz,* 504 F.2d 80, 83 (2d Cir.1974); *Suntex Dairy v. Bergland,* 591 F.2d 1063, 1067 (5th Cir.1979); *Minn. Milk Producers Assoc. v. Madigan,* 956 F.2d 816, 818 (8th Cir.1992).[6] Only the Ninth Circuit has

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[5] The dissent would read the AMAA to preclude all producer suits that do not explicitly allege that an order unfairly advantages some producers at the expense of others, on the theory that producers' right to vote on orders adequately protects them in other situations. The effect of this regime would be that when two-thirds of producers approve an order that is contrary to law but treats all producers alike, the remaining third of producers must submit to that order without judicial redress. There is no evidence Congress intended such a regime, and no court has advanced such a theory before. Instead, the quotation from *Stark,* especially the conclusion in the final sentence, evidences a focus on ensuring a judicial forum for producers who allege they are harmed by an illegal order, regardless of their right to vote on that order. *See Alto Dairy v. Veneman,* 336 F.3d 560, 565 (7th Cir.2003) (describing *Stark* as holding producers "could challenge . . . an order if in issuing it the Agriculture Department had exceeded the authority delegated to it by Congress and in doing so had infringed a definite right of the producer"). Similarly, in *Block* the Supreme Court states that judicial review of producer suits is necessary to ensure the AMAA's "fundamental objectives" of "the protection of producers," 467 U.S. at 351, 104 S.Ct. 2450, without limiting this to the protection of some producers from an abusive majority of other producers. This limitation is read into *Block* by the dissent. Dis. Op. at 834-35.

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[6] As with *Stark* and *Block,* the dissent limits the holdings of other circuits to fit a new line in the sand. In *Alto Dairy,* for example, a group of producers made the choice not to participate in a rulemaking and later complained that the promulgated rule differed so greatly from the proposal that they did not receive adequate notice. 336 F.3d at 570. They alleged no systemic failure in the referendum process nor oppression by a producer majority, only a procedural shortcoming. In those cases that did involve disputes among producers, nothing in the courts' opinions indicates that the determination of whether producers had a cause of action hinged on that fact. *See, e.g., Minn. Milk Producers,* 956 F.2d at 817 (finding standing for producers alleging violation of the Secretary's obligation under AMAA); *Farmers Union,* 930 F.2d at 473 ("The purpose of the AMAA strongly favors judicial review of aspects of market orders that concern

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read *Block* as broadly as the Department urges, stating in *Pescosolido v. Block*, 765 F.2d 827, 831 (9th Cir.1985), that "We believe that [*Block*] can be interpreted generally to foreclose judicial review sought by anyone other than handlers. . . ." In two recent cases addressing handler exhaustion of administrative remedies, this court has arguably assumed, without directly addressing the issue, that producers can bring suits challenging the Secretary's orders. *See Hettinga*, 560 F.3d at 503-504; *Edaleen Dairy*, 467 F.3d at 783; *supra* note 4.

It is true, as the Department and intervenor handlers point out, that a decade before *Blair*, in *Benson v. Schofield*, 236 F.2d 719 (D.C.Cir.1956), this court affirmed the dismissal of a complaint by dairy producer-handlers challenging a milk marketing order that extended the limits of a milk marketing area. In that case, the court addressed the merits of the claims that the rulemaking was procedurally defective for lack of notice to producers and an opportunity for them to attend hearings, *id.* at 722-23, but further concluded they were not seeking to vindicate "a statutory privilege protected by judicial remedies," and thus "lack[ed] a legal right." *Id.* at 723 (citing *Stark*, 321 U.S. at 306, 64 S.Ct. 559). *Benson* is inapposite for a number of reasons. First, in *Benson* the court was not addressing a diminution of producers'

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producers in lawsuits brought by producers."); *Dairylea Coop.*, 504 F.2d at 83 ("The Supreme Court . . . has held that this silence [as to judicial remedies] does not bar producers. . . .").

statutorily-guaranteed blend prices, as in *Stark, Blair*, and the instant case, but rather an order that increased the boundaries of a marketing area to cover a greater number of handlers, an action the court held did not infringe any statutory right possessed by the producers because only handlers were affected, *id.* at 723. Second, the suit in *Benson* was not brought under the APA, and the court did not hold that the AMAA impliedly precluded producer suits, only that the AMAA did not itself provide a cause of action for the claimed grievance regarding a marketing area. Given also that *Blair,* which presented a situation more analogous to the instant case, was decided after *Benson* and acknowledged a cause of action for producers challenging orders as beyond the Secretary's power, *Benson* is easily distinguishable.

Accordingly, we hold that the producers can bring suit under the APA to challenge the *Interim Rule,* which directly affects their blend prices through increased make allowances, even though the milk marketing orders will not directly affect the producer settlement fund. The producers are aggrieved, within the meaning of the APA, by the alleged diminution of their personal rights secured under the AMAA, the *Interim Rule* they challenge constitutes final agency action, and they seek non-monetary injunctive relief. 5 U.S.C. §§ 702, 704. We therefore turn to the merits of the producers' contention that the Secretary was statutorily required to determine and consider producers' feed and fuel costs in seeking to change a make allowance and failed to do so.

III.

In seeking to enjoin the *Interim Rule* on the ground that the Secretary failed to carry out mandated responsibilities, the producers rely on AMAA §§ 608c(18), enacted in 1937, and on § 608c(17)(G), the 2008 Act amendment to the AMAA.

Section 608c(18) requires the Secretary, in initially setting dairy prices, to ensure that those prices reflect a variety of factors. 7 U.S.C. § 608c(18).[7] The

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[7] Section 608(c)(18), "Milk prices," provides in relevant part:

> The Secretary of Agriculture, *prior to* prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers . . . , or prior to modifying the price fixed in any such terms, shall ascertain the parity prices of such commodities. The prices . . . shall . . . be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions, which affect market supply and demand for milk or its products in the market area to which the contemplated marketing agreement, or, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b . . . that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. *Thereafter*, as the Secretary finds necessary on account of changed circumstances, he shall

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parties disagree about which of § 608c(18)'s requirements apply to rulemakings like this one, in which the Secretary readjusts rather than initially sets prices. We need not decide the issue because even if all of § 608c(18)'s requirements apply, they impose no obligation relevant here beyond that imposed by § 608c(17)(G).

Section 608c(17)(G) provides:

> Monthly feed and fuel costs for make allowances
>
> As part of *any hearing* to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall –
>
> (i) determine the average monthly prices of feed and fuel incurred by dairy producers in the *relevant* marketing area;
>
> (ii) consider the *most recent monthly* feed and fuel *price data available*; and
>
> (iii) consider those prices in determining whether or not to adjust make allowances.

> after due notice and opportunity for a hearing, make adjustments in such prices.

7 U.S.C. § 608(c)(18) (emphasis added). The "parity price" of commodities is a statistical measure of prices adjusted for certain historical and efficiency factors. *Id.* § 1301(a)(1). In the *Interim Rule* the Secretary found that parity prices were not reasonable in view of the statutory factors. 73 Fed.Reg. at 44,613 [JA 122/2].

7 U.S.C. § 608c(17)(G) (emphasis added). The 2008 amendment to the AMAA thus plainly requires the Secretary, in adjusting make allowances, to consider producers' feed and fuel prices, and thus there is no occasion to decide if § 608c(18) also imposes such obligations.

The Department maintains the 2008 Act did not apply to the *Interim Rule* because the amendment to the AMAA took effect too late. The 2008 Act went into effect May 22, 2008, *see supra* note 1, and directs the Secretary to determine and consider certain costs "[a]s part of any hearing to adjust make allowances," 7 U.S.C. § 608(c)(17)(G). The final public hearing on the proposed order took place almost a year earlier, on July 11, 2007. Because the 2008 Act was not then in effect, the Department concludes the Secretary was under no obligation to determine and consider producers' costs "as part of" that hearing. This is true only if, as the Department maintains, the meaning of the word "hearing" in § 608c(17)(G) can only refer to "that part of the proceeding which involves the submission of evidence," as the Department's regulations in effect now and at the time of enactment of the 2008 Act provide. *See* 7 C.F.R. § 900.2(h). Such a definition, however, is incompatible with the plain text of § 608c(17)(G), which requires the Secretary "as part of any hearing" to "determine" feed and fuel costs and to "consider" those costs when changing make allowances. If the word "hearing" referred only to the proceeding in which an Administrative Law Judge ("ALJ") receives evidence, then Congress' directions to the Secretary would make no sense. The Secretary can only "determine" costs after the evidence has been received. By then, according to the Department's reading of the 2008 Act, it is too late because the "hearing" has already concluded. Likewise, the Secretary could not "consider" costs "as part of [the] hearing" as the Department defines it because those costs would not yet have been determined. It would be impossible to comply with the 2008 Act because the Secretary would need to do at once steps that logically must follow sequentially. The Department's regulations also make clear that the Secretary reaches decisions on the basis of the completed evidentiary record. *See* 7 C.F.R. § 900.13a ("After due consideration of the record the Secretary shall render a decision.").

In context, the term "hearing" in § 608c(17)(G) must mean more than the proceeding during which evidence is submitted to the Secretary. It must also include the portions of the rulemaking process during which the Secretary analyzes the evidence in the rulemaking record and reaches conclusions, because only then can the Secretary "determine" and "consider" costs. Indeed, another provision of the 2008 Act amendment to the AMAA seems to contemplate a broader understanding of "hearing," including within "Hearing timeframes" events that take place after the close of an evidentiary hearing, such as the submission of post-hearing briefs. *See* 7 U.S.C. § 608c(17)(C). This interpretation of "hearing" admittedly is at odds with the Department's regulation, *see* 7 C.F.R.

§ 900.2(h), and courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 184, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988); *see United States v. Wilson,* 290 F.3d 347, 357 (D.C.Cir.2002). However, as the Supreme Court observed in *Block* in regard to a different canon of construction, the presumption that Congress was aware of the background law "is just that – a presumption[, which,] like all presumptions used in interpreting statutes, may be overcome by specific language . . . that is a reliable indicator of congressional intent." 467 U.S. at 349, 104 S.Ct. 2450. Here, the presumption that Congress was aware of and incorporated the Department's definition of "hearing" would lead to the absurd result that Congress intended to impose a requirement with which the Secretary could not comply. Courts, "in interpreting the words of a statute, [have] 'some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute. . . .'" *In re Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 643, 98 S.Ct. 2053, 56 L.Ed.2d 591 (1978) (quoting *Comm'r v. Brown,* 380 U.S. 563, 571, 85 S.Ct. 1162, 14 L.Ed.2d 75 (1965)); *see Secretary of Labor, Mine Safety & Health Admin. v. National Cement Co. of Cal., Inc.,* 494 F.3d 1066, 1069 (D.C.Cir.2007); *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1088 (D.C.Cir.1996). For the same reason, the court owes no deference to the Department's interpretation of § 608c(17)(G) in this litigation; even had it been set forth by the Secretary as part of the rulemaking, it fails at *Chevron* step one. Applying "traditional tools of statutory construction" the court must reject the construction as contrary to clear congressional intent. *Chevron,* 467 U.S. at 842-43, 104 S.Ct. 2778.

In order to avoid the absurd result of an impossible instruction to the Secretary, § 608c(17)(G) must be read to allow the Secretary an opportunity to determine and consider producers' feed and fuel costs after the evidentiary record is closed. The rulemaking record for the *Interim Rule* does not indicate when the Secretary's review and deliberation took place, but for § 608c(17)(G) to be implemented in a reasoned manner, a "hearing" would be tied to the conclusion of the rulemaking, marked here by June 20, 2008 publication of the *Tentative Decision.* So understood, because the Secretary had not concluded the rulemaking for the *Interim Rule* when the 2008 Act went into effect on May 22, 2008, the Secretary was obligated to follow the requirements of § 608c(17)(G).

IV.

The 2008 amendment to the AMAA requires the Secretary to (i) determine the average monthly feed and fuel costs of dairy producers "in the relevant marketing area;" (ii) "consider the most recent monthly feed and fuel price data available" in arriving at that determination; and (iii) "consider those prices in determining whether or not to adjust make allowances."

7 U.S.C. § 608c(17)(G)(i)-(iii). Here, we part ways with the producers. Their contention that the Secretary failed to carry out these obligations is belied by the rulemaking record.

A. The record shows that the Secretary determines monthly feed and fuel costs (as well producers' other major costs) as a matter of course. During the evidentiary hearing, the ALJ took official notice of *Agricultural Prices* reports stretching back several years and up to the date of the hearing. These monthly and annual reports, prepared by the Department's National Agricultural Statistics Service, use extensive sampling to compute the nationwide average prices paid by and to farmers for the inputs and outputs of farming. *See, e.g.,* NAT'L AGRIC. STATISTICS SERV., DEPT. OF AGRIC., AGRIC. PRICES 26 (May 2008).[8] Included are the prices paid for feed, fuel, and a variety of other inputs such as machinery and rent, as well as a ratio of the cost of feed to milk. *Id.* at 28. These categories are broken down into subcategories and compared to previous months, years, and baseline and parity costs. *Id.* at 28-29. Given these extensive computations by the Department in the rulemaking record, there can be no doubt the Secretary determined producers' feed and fuel costs, even though the proposed rule did not explicitly purport to do so in fulfillment of the requirements of

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[8] *Available at* http://usda.mannlib.cornell.edu/MannUsda/viewDocumentInfo.do?documentID=1002.

§ 608c(17)(G)(i), or indeed mention that provision at all. *See also Interim Rule,* 73 Fed.Reg. 35,307 (citing AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., ECONOMIC ANALYSIS: CLASS III AND IV PRICING FORMULAS (2008)).

The Secretary complied as well with his obligation to determine those costs in "the relevant marketing area," § 608c(17)(G)(i). That provision is ambiguous because it does not define "relevant." The Department determines the nationwide average for producers' monthly feed and fuel costs in the *Agricultural Prices* reports. The producers contend that cannot satisfy the Secretary's obligations to determine costs "in the relevant marketing area," and the Secretary must instead compute separate costs for each national marketing area as those areas are defined in Department regulations. *See, e.g.,* 7 C.F.R. § 1001.1 (2008) (defining "Northeast Marketing Area" to include certain states and counties of other states). However, as the Department points out, the Secretary determined years ago that Class III and IV "dairy products can and do compete on a national market basis," and the value of milk used for Class III and IV products is thus driven by this national market. *Milk in the New England and Other Marketing Areas: Amplified Decision,* 59 Fed.Reg. 42,422, 42,424 (Aug. 17, 1994). In the *Tentative Decision,* the Secretary reiterated that because those products "compete in a national marketplace," the data considered in setting make allowances must likewise be nationwide in scope. 73 Fed.Reg. 35,325. In using the term "relevant marketing area," Congress did not indicate an intention to forbid that long-standing practice, but instead to invoke the Secretary's expertise. Given the broad statutory phrase, it was reasonable for the Secretary to determine producer costs on a nationwide basis, where he has determined the nationwide market *is* the relevant area.

The text of § 608c(18) differs very slightly in structure on this point from that of § 608c(17)(G). It provides the Secretary must fix prices to reflect costs and conditions "in the market area to which the . . . [milk marketing order or amendment] relates." *See supra* note 7. Assuming that obligation extends to this rulemaking, the Secretary has complied for the same reasons he has complied with § 608(17)(G)(i).

B. The Secretary also met his obligation to consider "the most recent" price data available when determining the producers' costs. 7 U.S.C. § 608c(17)(G)(ii). The ALJ took official notice of the monthly *Agricultural Prices* reports either through the end of 2007 or up through the date of the post-hearing briefing – in either event up to or past the close of the evidentiary record. The producers contend this data was too old to qualify as "the most recent monthly . . . data available," *id.*, because the evidentiary hearing concluded about one year before the *Tentative Decision* was published. However, § 608c(17)(G)(ii) does not define "most recent monthly feed and fuel price data available." The court would normally defer to a reasonable definition by the Secretary, *see Chevron*, 467 U.S. at 843, 104 S.Ct. 2778, but the Secretary did not advance an interpretation in the rulemaking, nor address the issue in his brief to this court. The court may readily conclude, upon reading § 608c(17)(G) as a whole, *see supra* at [24-25], that the most reasonable interpretation is that when "determining" feed and fuel costs, the Secretary must use the most recent data available as of the close of the evidentiary record. So read, the Secretary complied by using up-to-date data in compiling the figures in *Agricultural Prices, see, e.g.,* AGRIC. PRICES 26 (May 2008), and in taking official notice of the most recent issue of that report as of the close of the evidentiary period.

The producers offer a different reading of the statute which would require the Secretary to consider "the most recent . . . data available" as of the time the proposed rule is published (here, the *Tentative Decision* of June 20, 2008). But § 608c(17)(G)(ii) requires consideration of the most recent data "available," not the most recent data conceivable, and at some point the Secretary must stop receiving new evidence and review the rulemaking record. Time is also required to draft and publish the proposed rule. This is true even though the producers point out that the Secretary accepted a report from the state of California in November 2007, after the record had closed. *See Tentative Decision,* 73 Fed.Reg. at 35,324 n. 1. That the Secretary chose to reopen the record to accept new evidence on a single point does not indicate that he would be obliged to do so by § 608c(17)(G)(ii) in order to have the most recent data "available." Nothing in the 2008 Act indicates Congress intended to impose an unworkable obligation on the Secretary to reopen the record repeatedly to receive new data during the process of "determin[ing]" and "consider[ing]." As there must be a cutoff, the court has no basis on this record to fault a cutoff date of the close of the evidentiary record, one year before the Interim Rule was issued. Although it is conceivable that delay in publishing a proposed rule until long after the record closed could be inconsistent with the requirement to consider the "most recent data available," the producers show no prejudice as a result of the Secretary's failure to consider cost data available on June 20, 2008. *See City of Portland v. EPA,* 507 F.3d 706, 717 (D.C.Cir.2007); 5 U.S.C. § 706.

C. With regard to the Secretary's obligation to "consider [producers' feed and fuel] prices in determining whether or not to adjust make allowances," 7 U.S.C. § 608c(17)(G)(iii), the Secretary explicitly addressed these costs in promulgating the *Interim Rule*:

> In the aggregate, the costs of producing milk are reflected in the supply and demand conditions for the dairy products. When the supply of milk is insufficient to meet the demand for Class III and Class IV products, the prices for these products increase as do regulated minimum milk prices paid to dairy farmers because the milk is more valuable and this greater milk value is captured in the pricing formulas. Dairy farmers face no regulatory minimums in their costs and face no regulated minimum payment obligation

> in the way that regulated handlers must pay dairy farmers for milk.

73 Fed.Reg. at 35,324. The Secretary contrasted these producers costs, reflected in market pricing, with handlers' costs of manufacturing:

> The ability of a manufacturer to offset cost increases are limited by the level of make allowances in the Class III and Class IV price formulas. Manufacturing processors are charged the [Federal Milk Marketing Order] minimum price for producer milk used to produce Class III and Class IV products. However, plant manufacturing cost increases may not be recovered because Class III and Class IV product-price formulas use make allowances that are fixed regardless of market conditions and change only by regulatory action. Simply put, when manufacturing cost increases result in costs higher than those provided by the formula make allowance factors, the value of milk used to make those products may be overvalued.

Id. at 35,323. The Secretary concluded that it was therefore necessary to increase make allowances to reflect increases in the manufacturing costs incurred by handlers as shown in the record evidence. *Id.* at 35,323-4.

In sum, the Secretary considered the costs to producers, but reasoned that those costs could be recouped through market mechanisms. The make allowances, by contrast, represent the costs of handlers and are the only mechanism through which manufacturers' costs can be recouped under the pricing formulas. The Secretary concluded it was necessary to increase make allowances to reflect handlers' increased costs. Although the Secretary increased make allowances and thereby decreased the amount received by producers for a given market price, his well-reasoned analysis in the rulemaking record constitutes "consider[ing producers' feed and fuel] prices in determining whether or not to adjust make allowances," § 608c(17)(G)(iii).

V.

Although we hold that the producers may challenge the Secretary's decision in the *Interim Rule* to increase make allowances under the APA, and they correctly contend the Secretary was required to consider their costs for feed and fuel in deciding whether or not to amend make allowances, for the reasons set forth in Part IV they have shown no likelihood of success on the merits of their contention the Secretary exceeded his powers by failing to consider those costs. Thus, this court need not proceed to review the other three preliminary injunction factors and the district court's balancing of factors. *See Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253-54 (D.C.Cir.2006). The denial of the preliminary injunction is therefore affirmed.

On interlocutory review of petitions for injunctive relief, this court may reach the merits of a claim "inextricably bound up" with the issues on appeal. *Hartman v. Duffey,* 19 F.3d 1459, 1464 (D.C.Cir.1994) (quoting 16 CHARLES A. WRIGHT, ARTHUR R. MILLER. EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDUREE [sic] § 3921 p. 17 (1977)). As the Supreme Court has observed, "Review of a preliminary injunction 'is not confined to the act of granting [or denying] the injunctio[n], but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of [the] bill, and if so, to direct a final decree dismissing it.'" *Munaf v. Geren,* ___ U.S. ___, 128 S.Ct. 2207, 2219, 171 L.Ed.2d 1 (2008) (quoting *City and County of Denver v. N.Y. Trust Co.,* 229 U.S. 123, 136, 33 S.Ct. 657, 57 L.Ed. 1101 (1913)) (all but first alterations in original); *see also Deckert v. Independence Shares Corp.,* 311 U.S. 282, 287, 61 S.Ct. 229, 85 L.Ed. 189 (1940). Because there is an "insuperable objection" to the producers' claims predicated on the Secretary's alleged failure to consider feed and fuel costs under the AMAA, 7 U.S.C. §§ 608c(17)(G) and 608c(18), those claims in their complaint must be dismissed for failure to state a claim. *Munaf,* 128 S.Ct. at 2220. We remand the case to the district court for further proceedings consistent with this opinion.

GRIFFITH, Circuit Judge, dissenting in part and concurring in the judgment in part:

I write separately because I believe the Agricultural Marketing Agreement Act of 1937, Pub.L. No. 75-137, 50 Stat. 246, precludes judicial review of the producers' claims.

The Administrative Procedure Act grants a cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (2006). It withdraws that cause of action "to the extent that . . . statutes preclude judicial review." *Id.* § 701(a)(1). Preclusion may be found in the express language of a statute or in "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 349.

The Act expressly provides only to handlers, and no one else, a right to petition the Secretary of Agriculture for review of a marketing order and to obtain judicial review of the Secretary's ruling in response. 7 U.S.C. § 608c(15) (2006). The majority concludes nevertheless that producers have a right to judicial review because, unlike the consumers in *Block,* they play an "active role . . . during the rulemaking process," Maj. Op. at 823. But that does not mean Congress intended producers to be afforded judicial review for any complaint they might have with a marketing order.[1] To the contrary, their important role at the agency level explains why Congress withheld judicial review from them. No marketing order or amendment may issue without the approval of two-thirds of the affected producers (measured either by number or by volume of milk produced). *See* 7 U.S.C. § 608c(8)-(9). Producers can veto a proposed order for any reason; a court can only overturn an order if the Secretary has acted arbitrarily, capriciously, or contrary to law, *see* 5 U.S.C. § 706. The producer referendum is a far more powerful tool to challenge an action by the Secretary than the deferential review of a judicial forum. Ordinarily, producer interests will not, as the majority fears, "go unvindicated" without the availability of judicial review, Maj. Op. at 823. By contrast, Congress gave handlers a judicial remedy because they may vote on, but cannot block, a marketing order. An order or amendment may issue if fifty percent of the affected handlers vote to approve it. But if the handler referendum fails, the Secretary can nonetheless issue the order if he determines that the handlers' disapproval prevents the effectuation of the Act's policy and that the order is necessary to implement that policy. *See* 7 U.S.C. § 608c(8)-(9). No similar override is available if the producers vote down the proposed order.

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[1] The majority purports to limit its grant of judicial review to cases where producers claim a violation of their definite and personal rights. *See* Maj. Op. at 824, 827. But the fact that producers have a "definite and personal" right at stake in the contested order, as they no doubt have in this case, tells us only that they have statutory (as well as constitutional) standing. It does not tell us whether Congress has precluded them from enforcing this definite and personal right in court. *See Stark v. Wickard,* 321 U.S. 288, 306, 64 S.Ct. 559, 88 L.Ed. 733 (1944) ("[E]ven where a complainant possesses a claim to executive action beneficial to him . . . it does not necessarily follow that actions of administrative officials, deemed by the owner of the right to place unlawful restrictions upon his claim, are cognizable in appropriate federal courts of first instance."); *Block,* 467 U.S. at 351, 104 S.Ct. 2450 (explaining that the *Stark* producers' "definite and personal rights" gave them "standing to object to the administration of the settlement fund," but that this "standing could not by itself ensure judicial review of the Secretary's action at their behest"); *id.* at 353 n. 4, 104 S.Ct. 2450 (finding no need to address the constitutional and statutory "standing issues" because judicial review was precluded).

In some cases, however, the producer referendum is not an adequate forum in which to challenge unlawful actions of the Secretary. As the Court noted in *Stark v. Wickard,* 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), the producers' veto power "cannot protect minority producers against unlawful exactions which might be voted upon them by majorities." *Id.* at 307, 64 S.Ct. 559. If the Secretary's proposed action would benefit some producers at the expense of others, there is a risk that the majority producers will exploit the referendum process to approve measures in marketing orders that discriminate against minority producers. In these instances, judicial review is available for the minority producers. For example, the minority producers in *Stark* challenged a provision that required the market administrator to deduct a certain amount from the money paid by milk handlers before distributing it to producers. The deducted amount would then be paid only to producers who were members of cooperatives. *See id.* at 300-01, 64 S.Ct. 559. By sanctioning higher payments to producer cooperatives and lower payments to independent producers, this provision threatened the statutory objective of producer equality. Because the producer cooperatives had sufficient voting power to control the outcome of the referendum regardless of the lawfulness of the provision, there was no adequate forum in which the minority producers could challenge the provision as unlawful. And without judicial review for their claim, no group could be "relied upon to challenge agency disregard of the law," *Block,* 467 U.S. at 351, 104 S.Ct. 2450.

The majority reads *Stark* to require judicial review of all claims by producers. But *Block* emphasized that the structure of the Act demonstrates Congress's intent "that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers," 467 U.S. at 348, 104 S.Ct. 2450. The Court viewed the result in *Stark* as a limited exception applicable in "certain" cases, *id.* at 351, 104 S.Ct. 2450, when judicial review is "necessary to ensure achievement of the Act's most fundamental objectives," *id.* at 351-52, 104 S.Ct. 2450. When divergent producer interests threaten the ability of minority producers to use the forum provided by the Act – the referendum – judicial review is permitted to safeguard the primary statutory objective: "to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers," *id.* at 342, 104 S.Ct. 2450; *see also* 7 U.S.C. § 602 (declaration of statutory policy). Judicial review of orders and amendments that discriminate between producers ensures that the destabilizing producer competition targeted by the Act, *see Block,* 467 U.S. at 343, 104 S.Ct. 2450, does not infect the milk marketing orders themselves.

Permitting judicial review of producers' claims in this narrow set of circumstances is consistent with our precedent and that of other circuits. The cases cited by the majority in support of a more general grant of judicial review for producers each involved divergent producer interests comparable to the circumstances in *Stark. See Alto Dairy v. Veneman,* 336 F.3d 560 (7th Cir.2003) (Wisconsin producers who sold milk in Mideast region challenged amendment of Mideast pooling provision adopted without notice to them); *Minn. Milk Producers Ass'n v. Madigan,* 956 F.2d 816 (8th Cir.1992) (producers outside marketing area, who could not vote on the challenged order, argued that it stimulated overproduction in other areas); *Farmers Union Milk Mktg. Coop. v. Yeutter,* 930 F.2d 466 (6th Cir.1991) (rural producers challenged location adjustments that favored producers closest to cities); *Suntex Dairy v. Bergland,* 591 F.2d 1063 (5th Cir.1979) (independent milk producers challenged bloc voting by large producer cooperative);

Dairylea Coop., Inc. v. Butz, 504 F.2d 80 (2d Cir.1974) (recent market entrant challenged provision resulting in lower prices for newly entering producers); *Blair v. Freeman,* 370 F.2d 229 (D.C.Cir.1966) (distant producers challenged "nearby differential" in price that advantaged producers closest to New York City); *cf. Pescosolido v. Block,* 765 F.2d 827 (9th Cir.1985) (prohibiting judicial review of orange growers' claim that Secretary was not ensuring parity prices, an interest common to all growers).

The difference between this case and those – the one that "eludes" the majority, Maj. Op. at 825 – is that the producers here had an adequate forum in which to challenge the Secretary's actions because the new make allowances treat all producers uniformly. Because the producers' interests here are all aligned in the same direction, the risk that existed in *Stark* of larger producers capturing the referendum process to unlawfully disadvantage the minority is not present. The producer referendum thus served its purpose as a check on the Secretary's statutory authority. Judicial review is not necessary to vindicate the objectives of the Act, and we should defer to the congressional preference – expressed in the Act's structure – to preclude that review. I would affirm the district court's ruling that judicial review is precluded and remand with direction to dismiss the producers' claims.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5406 September Term, 2008

ARKANSAS DAIRY COOPERATIVE ASSOCIATION, INC., ET AL., FILED ON: JULY 24, 2009

APPELLANTS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01426-EGS)

Before: ROGERS, TATEL and GRIFFITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause be affirmed with respect to the denial of injunctive relief; certain claims be dismissed for failure to state a claim; and the case be remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
MaryAnne Lister
Deputy Clerk
Date: July 24, 2009

Opinion for the court filed by Circuit Judge Rogers.

Opinion dissenting in part and concurring in the judgment in part filed by Circuit Judge Griffith.

576 F.Supp.2d 147

United States District Court,
District of Columbia.
ARKANSAS DAIRY COOPERATIVE, INC., et al.,
Plaintiffs,
v.
UNITED STATES DEPARTMENT
OF AGRICULTURE, Defendant,
and
International Dairy Foods Association, and
Agri-Mark, Inc., et al., Defendant-Intervenors.
Civ. No. 08-1426(EGS).

Sept. 19, 2008.

Benjamin F. Yale, Yale Law Office, L.P., Waynesfield, OH, Ryan K. Miltner, The Miltner Law Firm, LLC, for Plaintiffs.

Kyle Renee Freeny, U.S. Department of Justice, Washington, DC, for Defendant.

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MEMORANDUM OPINION

EMMET G. SULLIVAN, District Judge.

This case was filed by a group of dairy producers and cooperatives seeking declaratory and injunctive relief from an interim final order of the U.S.

Department of Agriculture ("USDA") that reduces the minimum prices dairy farmers receive under federal milk marketing orders ("FMMO").[1] Plaintiffs contend that they would be irreparably harmed by allegedly unlawful changes to the minimum price formulas used to determine prices paid to dairy farmers. They maintain that the interim final rule that increases the "make allowance"[2] factors in the formulas that establish the federal minimum milk price are unlawful and must be set aside because the regulation failed to consider factors mandated by the Food, Conservation, and Energy Act of 2008 ("FCEA"), Pub L. 110-246, § 1504, 122 Stat. 1651, 1721 (2008), codified at 7 U.S.C. § 608c(17)(G) and the Agricultural Marketing Act of 1937, as amended 7 U.S.C. §§ 602, *et seq.* ("AMAA "). Plaintiffs originally argued that the order was unlawful because it was scheduled to take effect only twenty-two days after it was promulgated, whereas the statute requires at least thirty days notice. After this lawsuit was filed, USDA postponed the effective date of the amendment; Plaintiffs and Defendants agree that the notice issue is now moot.

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[1] Plaintiffs include the Arkansas Dairy Cooperative Association, Inc. of Damascus, AZ; Central Sands Dairy, LLC of Nekoosa, WI; Columbia River Dairy, LLC of Boardman, OR; Continental Dairy Products, Inc of Artesia, NM; Dairy Producers of New Mexico of Roswell, NM; Lone Star Milk Producers, Inc. of Windthorst, TX; Maryland and Virginia Milk Producers Cooperative Association of Reston, VA; Select Milk Producers, Inc. of Artesia, NM; United Dairymen of Arizona of Tempe Arizona; and Zia Milk Producers, Inc. of Roswell, NM.

[2] A "make allowance" is a USDA-regulated and fixed margin between the wholesale price of commodity dairy products and the regulated milk price that product manufacturers may pay to producers.

Plaintiffs further allege that USDA's decision was based on speculation, was arbitrary and capricious, and that the USDA denied them the right to participate in the hearing process when making its decision.

USDA argues that Plaintiffs are improperly attempting to set aside extensive and careful decision-making by USDA in the complex area of milk price regulation. USDA contends that Plaintiffs' motion should be denied because they have failed to make any of the required showings for such relief. USDA maintains that Plaintiffs have not accurately evaluated the harm to dairy manufacturers nationwide if their motion is granted and that the public interest strongly favors permitting the new regulations to go into effect. Intervenor-Defendant International Dairy Foods Association ("IDFA") argues that this Motion should be denied for lack of standing.

Upon consideration of the motion, the responses and replies thereto, oral argument made at the hearing, and the applicable law, the Court **DENIES** Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

The USDA administers and modifies FMMOs under the authority of the AMAA, which was first enacted by Congress in 1937. *See* 7 U.S.C. § 608c(7). USDA regulates milk prices in order to advance market stability, supply adequacy, milk cost equity between handlers, and milk price equity between producers. *See* 64 Fed.Reg. 16,026, 16,109 (April 2, 1999). USDA is concerned with a "more efficient pricing structure that offers cost savings in the organization of the nation's milk supply and in the transportation of milk and dairy products." *Id.* at 16,113.

FMMOs "provide[] a uniform blend price for sellers of raw milk while imposing nonuniform obligations on the dealers purchasing that milk." *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 189 n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). "[S]ince Federal order prices are minimum prices, handlers may increase their pay prices in response to changing supply/demand conditions even when Federal order prices do not increase." 67 Fed.Reg. 67,905, 67,911 (Nov. 7, 2002). "The formulas are used to establish minimum prices for milk used in making particular dairy products, not for determining payments to dairy farmers." *Id.*

Since fluid milk commands a higher price than milk that is used in the manufacture of other dairy products, the price of milk is determined by the end use of it, even when the milk is of the same quality.

See Alto Dairy v. Veneman, 336 F.3d 560, 562 (7th Cir.2003). For the purposes of the FMMOs, however, USDA classifies milk according to its end use: Class I (for fluid milk products); Class II (for soft dairy products like yogurt and cottage cheese); Class III (for hard and spreadable cheeses); and Class IV (for butter, evaporated milk, and dried milk). *See* 7 C.F.R. § 1000.40.

The "make allowances" used in Class III and Class IV prices are uniform throughout the country because USDA determined that manufactured dairy products compete in a national market. *See* 59 Fed.Reg. 42,422 42,424 (Mar. 10, 1994). The make allowance rate remains constant even as product prices may increase or decrease substantially. Though Class I prices begin with the uniform Class III and IV calculations, Class I prices vary by milk marketing order because Class I prices are adjusted by location-specific "differentials" that account for local supply and demand. *See* 7 C.F.R. § 1000.52. The minimum price for milk components used to make Class II products is determined by adding seventy cents per hundredweight (100 pounds) to the Class IV price, *Id.* § 1000.50(e), and the minimum prices for milk components used to make Class I products is determined by adding a fixed "differential" (which varies by geographic location) to the higher of the Class III or IV price in a given month, *id.* §§ 1000.50(a), 1000.52.

After USDA sets make allowances, milk producers are then guaranteed to be paid a uniform minimum price for the milk they sell to handlers, regardless of the end use. This ensures that producers who sell milk to a fluid processor do not get a higher price than producers who sell to a cheese plant. *See* 7 U.S.C. § 608c(5)(B)(ii). Only two-thirds of milk production in the United States is subject to the orders; the other one-third is subject to state orders, or no orders. USDA issues regional milk orders that govern terms and conditions for the sale of dairy products in specific geographical regions. *See* § 608c (11)(C).

Under the FMMOs, a dairy plant pays, and a dairy producer receives, minimum prices in the form of federally established "component prices" for butterfat, protein, solids not fat, and other solids, or skim-fat prices that are derived from those component prices. *See* 7 C.F.R. § 1000.50. There are three factors that are used in the pricing formulas: (1) prices of certain dairy products surveyed by the National Agricultural Statistics Service ("NASS"); (2) a make allowance; and (3) a yield. *See id.* The levels of each of these factors affect the price that plants pay for raw milk and, ultimately, how much producers received for their milk. Adjustments in any of these factors will impact pricing.

The make allowance and the yield are fixed by rule; the product prices are determined weekly by NASS. *See id.* Every Friday morning, NASS reports the prices of certain cheeses, butter, non-fat dry milk, and dry whey. USDA then announces the advanced prices based on the weighted average of two weeks of

NASS prices. *Id.* The make allowances represent the allowance for manufacturing raw milk into a finished product. Changes to the make allowance have an inverse relationship to the resulting changes in the minimum prices. Producers benefit from lower make allowances, and manufacturers benefit from higher make allowances. The yield factor represents the amount of a manufactured dairy product that can be produced per hundredweight (100 pounds) of milk. USDA accounts for the portion of the price of milk that is attributable to the costs of the manufacturing process through the make allowance. When the price of manufactured goods is raised, however, USDA recaptures the cost by reporting a higher price for the wholesale product prices to NASS. As a result, any increase in the selling price of manufactured goods used to produce milk will increase the price manufacturers must pay producers for raw milk. *Id.*

The pricing formulas are changed through formal rule-making hearings. *See* 7 C.F.R. §§ 900.3-900.18. After the close of the evidentiary portion of the hearing, exceptions and comments are filed by interested parties and an administrative law judge certifies the transcript to USDA. *See id.* §§ 900.9-900.10. Dairy Programs, a division of USDA, then prepares and submits a recommendation to USDA. The recommendation details the findings of fact, rationale, and the legal authority for its decision. *See id.* § 900.12. After Dairy Programs has issued its recommendation, another round of comments follow, and a referendum on the order, as amended, is held.

Producers facing a referendum must choose between voting out the entire marketing order or approving the amended order. There is no vote on the amendment itself. If the referendum passes, the order is adopted and becomes a final rule. *See id.* §§ 900.300-311.

In the instant case, the USDA announced its original hearing to address only the proposed adjustments to the make allowances in the pricing formulas in January 2006. An on-the-record hearing was held that month and post-hearing briefs were filed. On September 6, 2006, however, USDA announced that it had insufficient evidence to issue a decision changing the make allowances. Another hearing was reconvened for September 14, 2006. USDA announced a tentative final decision on November 2, 2006 and required comments to be filed by January 22, 2007. *See* 71 Fed.Reg. 67,467, 67,467 [sic] (Nov. 22, 2006). On December 29, 2006, an interim order was issued. A legal challenge was launched to halt the implementation of those make allowances, *see Bridgewater Dairy, LLC v. U.S. Dep't of Agric.*, 2007 WL 634059 (N.D.Ohio Feb.22, 2007), and the hearing remains open, as USDA has not ruled on the comments or made a final decision.

While the hearing was pending, USDA published notice of the instant Formula Hearing on February 9, 2007. That notice included a number of modifications to the component prices of the formulas but also included proposed adjustments to the make allowances, which was the subject of the hearing that was still pending. The Formula Hearing commenced on July 11, 2007, and was held in three different cities over the course of twelve days. Thirty witnesses provided live testimony before an administrative law judge, and seventy-eight exhibits were entered into evidence. USDA took judicial notice of numerous documents, including government data on fuel and feed prices. USDA also commenced an econometric analysis of the impact of the price increase; the econometric model accounted for various factors including feed costs incurred by producers.[3] The comments were filed, and an administrative law judge certified the transcript on October 11, 2007.

On June 16, 2008, USDA issued a tentative partial final decision, and published the decision in the Federal Register four days later. *See* 73 Fed.Reg. 35,306 (June 20, 2008). USDA concluded that "current make allowance levels are not reflective of the costs manufacturers incur in processing raw milk into the finished products of cheese, butter, [non-fat dry milk], and dry whey" and that the make allowances required adjustment in order to reflect the significant increase in these costs. *Id.* at 35,324 n. 4. Furthermore, USDA noted that while "the costs of producing milk are reflected in the supply and demand conditions for the dairy products," the increased costs incurred by manufacturing and processing that milk can only be recovered by regulatory modification of the make allowance. *Id.* The formula that USDA used here is the same formula that was used to calculate the make allowance adjustment in 2006. The Secretary of the Department of Agriculture ("Secretary") specifically found that the minimum price for milk reflected the prices of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk. *See* 73 Fed.Reg. 44,617, 44,618 (July 31, 2008). Producers, by referendum, approved the proposal by a two-thirds vote to increase the make allowances. *See id.; see also* 7 U.S.C. § 608c(9)(B)(i) (requiring approval of two-thirds of milk producers for milk marketing orders). USDA made a determination that an urgent need existed to increase make allowances, and after a referendum vote, the proposed rule was adopted as an interim final rule on July 31, 2008. *See* 73 Fed.Reg. at 44,618. But for the instant lawsuit, the Formula Rule was to take effect on an emergency basis on September 1, 2008. *See id.*

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[3] Econometric modeling – a long-accepted aid to agency decision-making in complex economic regulation, *see Sierra Club v. Costle,* 657 F.2d 298, 332-38 (D.C.Cir.1981) – is a significant part of USDA's decision-making process for preliminary and final economic analyses of the supply, demand, and price impact of proposed make allowance amendments on the dairy sector, including producers, manufacturers, and consumers.

Plaintiffs sent Dairy Programs a letter on August 8, 2008, arguing that the Formula Rule did not comport with statutory requirements and warning that implementation of the rule on August 22, 2008 would violate USDA's rules requiring at least thirty days notice before implementation. Plaintiffs requested that USDA withdraw the Formula Rule, but the request was denied on August 14, 2008. The interim final rule was to take effect September 1, 2008. On August 15, 2008, Plaintiffs filed a motion in this court for a temporary restraining order. In response, USDA postponed the effective date of the rule by one month to allow this Court to rule on Plaintiffs' request for a preliminary injunction.

On August 19, 2008, this Court granted International Dairy Foods Association's ("IDFA") Motion to Intervene as Defendant. On August 26, 2008, this Court granted a Motion to Intervene as Defendants for Agri-Mark, Inc., Associated Milk Producers, Inc., Foremost Farms USA Cooperative, Land O' Lakes, Inc., Michigan Milk Producers Association, and Northwest Dairy Association.

II. DISCUSSION

1. Standing

Intervenor IDFA argues that Plaintiffs lack standing in this Court because the AMAA is the kind of law that "preclude[s] judicial review" in either express or implied terms according to the Administrative Procedure Act ("APA"). 5 U.S.C. § 701(a)(1). Arguing that their claims are akin to those made in *Stark v. Wickard,* 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), where the Supreme Court found standing for producers, Plaintiffs contend that they have standing to challenge a final rule that reduces payments into the producer settlement fund.[4] Plaintiffs' complaint makes no reference to the producer settlement fund, and the Court finds their argument unpersuasive. For the following reasons, this Court finds that the AMAA does not provide producers the right to bring a lawsuit which challenges the legality of one or more provisions of an FMMO. Therefore, Plaintiffs lack standing and are precluded from challenging the final interim order at issue.

Plaintiffs' complaint is the kind of complaint the D.C. Circuit deemed improper in *Benson v. Schofield,* 236 F.2d 719 (D.C.Cir.1956). In *Benson,* the D.C. Circuit held that producers do not have standing to challenge FMMOs. The Court found that producers-who are unregulated by the AMAA – are given no more rights than handlers – who are regulated under the AMAA – to challenge FMMOs in court. *Id.* at 722.

In *Block v. Commt'y Nutrition Inst.,* 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984), the Supreme Court also held that the AMAA precludes judicial review of consumer challenges to an FMMO. Citing 7 U.S.C. § 608c(15)(A), the Supreme Court noted that only processors have an express cause of action under the Act. "Congress intended that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers in accordance with 7 U.S.C. § 608c(15)." *Id.* at 348, 104 S.Ct. 2450. The Court explained that the "regulation of agricultural products is a complex, technical undertaking" and that "Congress channeled disputes concerning marketing orders to the Secretary in the first instance because it believed that only [she or] he has the expertise necessary to illuminate and resolve questions about them." *Id.* at 347, 104 S.Ct. 2450. "[W]hen a statute provides a detailed mechanism for judicial consideration for particular issues at the behest of particular persons," judicial review by others is "impliedly precluded." *Id.* at 349, 104 S.Ct. 2450.

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[4] In *Stark,* the Supreme Court held that producers had standing to challenge certain deductions the Secretary made from the producer settlement fund. *Stark,* 321 U.S. at 302, 64 S.Ct. 559.

The *Block* Court distinguished *Stark* based on the unique facts of that case. *Stark* held that the AMAA did not impliedly preclude judicial review of "certain administrative actions even though the Act did not expressly provide them a right to judicial review." *Block,* 467 U.S. at 351, 104 S.Ct. 2450. *Stark,* however, involved a situation where "'handlers could not question the use of the [producer settlement] fund, because handlers had no financial interest in the fund or its use.'"[5] *Id.* at 351-52, 104 S.Ct. 2450 (quoting *Stark,* 321 U.S. at 308, 64 S.Ct. 559).

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[5] Likewise, in *Benson,* the D.C. Circuit acknowledged the narrowness of the holding in *Stark* because the legal challenge was "not that the blended price [was] too low, but that the blended price has been reduced by a misapplication of money deducted from the producers' minimum price." *Benson,* 236 F.2d at 723.

In *Edaleen Dairy, LLC v. Johanns,* 467 F.3d 778 (D.C.Cir.2006), the D.C. Circuit re-confirmed that *Stark* was a "limited holding that turned on the unique circumstances of that case." *Id.* at 782. The D.C. Circuit found that the "two key factors" were that "the producers were not merely objecting to the regulation [but] were suing to protect their 'definite personal rights' in the settlement pool fund," for which there was "no access to an administrative remedy." *Id.* (quoting *Stark,* 321 U.S. at 308, 64 S.Ct. 559). The reasoning in *Benson* guides this Court's analysis, and *Edaleen Dairy* provides direction for how the D.C. Circuit might decide this issue if it were squarely presented with it today. *Edaleen Dairy* re-enforced the "narrow exception" the Supreme Court carved out in *Stark* for producers "who seek to challenge a milk marketing order". *Id.* at 782. *Edaleen Dairy* also emphasized that its holding was consistent with *Alto Dairy,* where the Seventh Circuit found that a group of producers and producer-handlers were entitled to judicial review. *See Edaleen Dairy,* 467 F.3d at 784 (citing *Alto Dairy,* 336 F.3d at 568-69). The D.C. Circuit distinguished *Alto* as involving "plaintiffs [who] were seeking *access* to pooling funds." *Id.* Plaintiffs here make so [sic] such claim in their complaint. The legal challenges before this Court are presented by a group of producers and cooperatives (some of which are producer-handlers)[6]

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[6] No plaintiff is asserting a right as a handler to judicial review in this matter.

"objecting to a regulation" rather than a producer asserting a definite personal right in a settlement fund.

Producer standing has also been examined by this Court. In *Northwest Ind. Producers Ass'n v. Veneman,* 312 F.Supp.2d 23 (D.D.C.2004), this Court, relying on *Block,* held that producers did not have standing to challenge the mechanism by which price values for various classes of milk were determined under the AMAA. *Id.* at 26 ("[T]he inclusion of producers in the administrative process but their exclusion from the provisions enabling judicial review is the type of omissions that indicate a specific Congressional intent to omit."). In *Goodie Brand Packing Corp. v. Lyng,* 1987 WL 14597 (D.D.C.1987), this court held that "plaintiffs must be 'handlers' within the meaning of the AMAA in order to obtain judicial review of the present order" therefore "producers lack standing to challenge marketing order[s]." *Id.* at *2.

Plaintiffs' protestations to the contrary, *Blair v. Freeman,* 370 F.2d 229 (D.C.Cir.1966), provides them with no support. In *Blair,* the D.C. Circuit found that the producer's challenge was similar to the one in *Stark* because "[t]he appellants . . . have standing to invoke the protection of equity to insure that their statutory right to minimum price protection is not being improperly diminished." *Id.* at 235 n. 15 (citing *Stark,* 321 U.S. at 290, 64 S.Ct. 559). Plaintiffs invoke no such statutory right in this case.

Other circuits have also held that outside of the narrow exception found in *Stark,* producers do not have standing in the type of challenge before this Court. *See Pescosolido v. Block,* 765 F.2d 827, 832 (9th Cir.1985) ("We agree with those circuits which narrowly construe the exception in *Stark* to avoid evasion of the statute's clear intent to preclude generally such [farmer] actions."); *Marchezak v. McKinley,* 607 F.2d 37, 41 (3d Cir.1979). *Cf. Dairylea Cooperative, Inc. v. Butz,* 504 F.2d 80, 83 (2d Cir.1974) (finding *Stark's* narrow exception applicable and permitting producer's suit). *But see Minn. Milk Producers Ass'n v. Madigan,* 956 F.2d 816 (8th Cir.1992) (finding producer standing).

Having failed to make a claim that they are seeking to protect a definite personal right granted by statute as in *Stark,* Plaintiffs lack standing to challenge the FMMO. Even if the Motion for Preliminary Injunction were properly before this Court, for the following reasons, this Court would deny it.

2. Injunctive Relief

a. Standard of Review for Injunctive Relief

When deciding a claim for injunctive relief, a court must weigh four factors: "(1) whether there is a substantial likelihood that plaintiffs will succeed on the merits of their claims, (2) whether plaintiffs will suffer irreparable injury absent an injunction, (3) whether an injunction would harm the defendants or other interested parties (the balance of harms), and (4) whether the public interest would be furthered by an injunction." *Monument Realty, LLC v. Wash. Metro. Area Transit Auth.*, 540 F.Supp.2d 66, 74 (D.D.C.2008) (citing *Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1317-18 (D.C.Cir.1998)). "The factors 'must be viewed as a continuum, with more of one factor compensating for less of another.'" *Id.* (quoting *Bradshaw v. Veneman,* 338 F.Supp.2d 139, 141 (D.D.C.2004)). Therefore, "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *CityFed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 747 (D.C.Cir.1995). A preliminary injunction is "an extraordinary and drastic remedy," *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997), and courts should grant it only when the party seeking relief clearly carries its burden of persuasion, *Monument Realty,* 540 F.Supp.2d at 74.

i. Likelihood of Success on the Merits

Plaintiffs maintain that they can show a likely success on the merits because they argue that USDA has failed to follow statutory mandates to determine and consider the monthly average costs of feed and fuel in the marketing areas and to consider those numbers in determining whether or not to adjust make allowances. Plaintiffs contend that their argument that they will succeed on the merits is very simple: They argue that the FCEA requires an analysis of fuel and feed costs in plain, unambiguous terms and that USDA implicitly and explicitly demonstrated that in its decision, it chose not to conduct that analysis and has therefore failed to comply with the FCEA. Plaintiffs' characterization of USDA's rulemaking process is at odds with the facts and Plaintiffs' own brief. Plaintiffs' claims are based on an erroneous reading of 7 U.S.C. § 608c(18), which does not constrain USDA in the manner they suggest.

This Court's interpretation of the statutory language is that the second and third sentences of § 608c(18) only apply when the Secretary first fixes minimum prices using a new pricing methodology, and only to minimum prices as a whole, not to each input used to derive those prices. It is clear that § 608c(18) can be satisfied by an *indirect* relationship between prices and economic conditions. *See Bridgewater Dairy*, 2007 WL 634059 at *6-*7. If there were any ambiguity in the statute, under *Chevron,* the agency's reasonable construction of the statute is controlling. *See Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (citing *Chevron,* 467

U.S. at 843-44, 104 S.Ct. 2778). *Chevron* deference is particularly appropriate in the context of the "labyrinth of the federal milk marketing regulation provisions." *Zuber v. Allen,* 396 U.S. 168, 172, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969); *see also Blair,* 370 F.2d at 232 ("A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing.").

USDA argues that the statute is clear that after the Secretary initially fixes minimum milk prices for a marketing order at a price other than parity, the Secretary is not bound to revisit every enumerated economic factor each time he makes an adjustment to those prices to account for changed circumstances. This is a reasonable interpretation of the statute, and an interpretation that gives effect to each sentence of the subsection. The first sentence of § 608c(18) directs the Secretary to ascertain the parity price of milk as a guidepost for establishing minimum prices in any milk marketing order.

> The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities.

7 U.S.C. § 608c(18). The price parity is regularly calculated by USDA. The second sentence then

directs the Secretary to adjust that parity price as necessary based on consideration of certain economic factors:

> [The parity price] shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates.

Id. The third sentence then details the manner in which the Secretary is to depart from the traditional reliance on parity prices if he finds them unreasonable in light of economic factors:

> Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

Id. The Secretary has not set price parity for many years, as the current price parity is much higher than necessary to ensure an adequate supply of milk. What the Secretary has done is fix minimum prices, first through competitive pay price series, and then through the product-pricing formulas in use today.

It is the fourth sentence that sets forth the procedure for making further adjustments to minimum milk prices once the Secretary has already fixed minimum prices at a level other than parity using the procedures outlined in the first three sentences:

> Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

Id. Even though the fourth sentence still requires that the rule-making process include a hearing, it contains no language mandating direct consideration of each of the economic factors articulated in the second and third sentences. Once the Secretary has fixed prices at a level other than parity, this final sentence then enables the Secretary to adjust minimum milk prices in response to "changed circumstances" without specifically requiring re-consideration of all other economic factors.

USDA argues that the term "changed circumstances" in the fourth sentence – while the second and third sentences both specifically mention a list of economic factors – indicates that the fourth sentence should be given a distinct meaning. In drafting the sentence in the way that it did, Congress clearly demonstrated a willingness to re-articulate the mandatory economic factors word-for-word in the second and third sentences. *See Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F.Supp.2d. 92, 100 (D.D.C.2006) ("'When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983))). Congress did not articulate those same requirements in the fourth sentence and chose to write the statute in that manner for a reason. This court is not persuaded to disturb the Secretary's reasonable interpretation of the statute.

The fourth sentence provides the Secretary with greater discretion to adjust prices to respond to changed circumstances, once he has initially fixed prices at a level other than parity in accordance with the third sentence. Construing the statute in any other way would make the words of the statute meaningless. *See Reiter v. Sonotone Corp.,* 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used." (citing *United States v. Menasche,* 348 U.S. 528, 538-39, 75 S.Ct. 513, 99 L.Ed. 615 (1955))); *see also Nat'l Ass'n of Broadcasters v. Librarian of Congress,* 146 F.3d 907, 926 (D.C.Cir.1998) ("[W]e do not read [the] subsection

. . . in a manner that renders superfluous the final sentence of that provision.").

On its face, the statute provides that the overall price should reflect the enumerated economic factors; it does not mandate that every variable or input used to calculate that price also reflect those economic factors. *See Minn. Milk Producers Ass'n v. Glickman,* 153 F.3d 632, 645 (8th Cir.1998) ("It is the total Class I price . . . and not just the differential, that must satisfy the statute."). The Eighth Circuit held that USDA satisfied the statute when it determined that the Class I pricing formula reflected the statutory factors in § 608c(18). *Id.* This court agrees. When the USDA first adopted the pricing system that is currently in place, the agency determined that the overall design of the formulas would automatically account for the economic factors set forth in the statute. *See* 64 Fed.Reg. at 16,095 ("The pricing system contained in this decision will . . . account[ ] for changes in feed costs and feed supplies indirectly. The product price formulas adopted in this rule should reflect accurately the market values of the products made from producer milk used in manufacturing."); *see also* 67 Fed.Reg. 67,915 at (noting that statutory requirements were "fulfilled by the Class III and Class IV component price calculation"). This determination was made in 1999 when USDA initially fixed minimum price formulas; the agency is not required to revisit the market value of the products each time it adjusts the value assigned to some factor within those formulas. The underlying design of the formulas remains unchanged and accords with the statute. The challenged rule-making "[did] not modify the portion of the formulas which indirectly incorporates feed costs and supply;" therefore, no additional requirements are in imposed upon the agency at this time. *Bridgewater Dairy,* 2007 WL 634059 at *7.

Plaintiffs make much of the fact that USDA did not "directly" consider the price of feeds and fuel when it varied the price of milk. The text of the statute does not mandate such a requirement. That statute merely requires the Secretary to adjust prices "as he finds will reflect" the listed factors. 7 U.S.C. § 608c(18). The Secretary has found, and hearing testimony reflects, that the minimum prices automatically reflect the statutory factors. *See* 64 Fed.Reg. at 16,095. Plaintiffs do not dispute this finding and acknowledge that the Secretary did indirectly consider the price of feeds and fuel. *See* Pl. Br. at 12. This concession is fatal to their claim and reflects their inability to demonstrate a likelihood of success on the merits.

Lansing Dairy, Inc. v. Espy, 39 F.3d 1339 (6th Cir.1994) and *St. Albans Co-op. Creamery, Inc. v. Glickman,* 68 F.Supp.2d 380 (D.Vt.1999), cited by Plaintiffs, undermines, rather than supports, their position. In *Lansing Dairy,* the Sixth Circuit concluded that § 608c(18) "is not a model of clarity or succinctness." 39 F.3d at 1351. In light of that ambiguity, per *Chevron*, the Sixth Circuit deferred to USDA's construction of the statute. *Id.* In *Bridgewater*

Dairy, which was bound by *Lansing Dairy,* the court concluded that the case provided no support for Plaintiffs' position. *Id.* at *14. *St. Albans* is not helpful to Plaintiffs because Congress legislatively overruled it. *See* Pub.L. No. 106-113, 113 Stat. 1501 (Nov. 29, 1999); *see also* 64 Fed.Reg. 70,867, 70,868 (Dec. 17, 1999). As *Bridgewater Dairy* noted, such congressional action "severely undermine[s]" any persuasive value the case might have otherwise have had. *Bridgewater Dairy,* 2007 WL 634059 at *5.

USDA defends its use of national economic trends as reasonable and within the statute. Section 608c(18) requires consideration of "economic conditions which affect market supply and demand" in each marketing area, and USDA determined a number of years ago that the value of Class III and IV milk is driven by the national market for the dairy products for which the milk is used. *See* 59 Fed.Reg. at 42,424; 73 Fed.Reg. at 35,325; 64 Fed.Reg. at 16,100; *see also Defiance Milk Products Co., A Div. of Diehl, Inc. v. Lyng,* 857 F.2d 1065, 1066 (6th Cir.1988). USDA submits that there is no evidence, as charged by Plaintiffs, that its long-standing determination that it is appropriate to look at the national market to assess the value of Class III and IV milk is arbitrary and capricious. This Court agrees.

USDA argues that Plaintiffs are no more likely to succeed under § 1504 of the FCEA which directs the Secretary to "[a]s part of any hearing to adjust make allowances [to] determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area consider the most recent monthly feed and fuel price data available; and consider those prices in determining whether or not to adjust make allowances." 7 U.S.C. § 608c(17)(G). For the same reasons previously stated, USDA complied with § 1504 of the FCEA.

USDA also contends that Plaintiffs' arguments under the FCEA also fail because the provision Plaintiffs cite to did not take effect until May 22, 2008. *See* Pub.L. No. 110-246, § 4. The hearing in question, however, closed on July 11, 2007. The effective date marks the date on which parties must begin to conform their conduct to a statute's substantive mandates. The plain language of the statute only governs hearings conducted after its effective date and because the hearing at issue was completed nearly a year earlier, the court need look no further. Even if there was any ambiguity, the term "hearing" must be resolved by reference to the agency's reasonable interpretation of that term. *See Chevron,* 467 U.S. at 843-44, 104 S.Ct. 2778. There is also a strong presumption against retroactivity. *See Gersman v. Group Health Ass'n,* 975 F.2d 886, 895 (D.C.Cir.1992) ("legislation must be considered as addressed to the future, not to the past" (quoting *Greene v. United States,* 376 U.S. 149, 160, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964))). The interpretation of § 1504 advanced by the Plaintiffs would be retroactive, and therefore presumptively erroneous.

Plaintiffs have not demonstrated a likelihood of success on the merits.

ii. Irreparable Harm

"Irreparability of injury is a very high standard." *Am. Coastal Line Joint Venture, Inc., v. U.S. Lines, Inc.,* 580 F.Supp. 932, 936 (D.D.C.1983); *see also Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C.Cir.1985) (irreparability of injury "must be both certain and great; it must be actual and not theoretical").

Plaintiffs' claims of economic harm fall short of the high bar set for irreparable harm. Harm alleged from unspecified contractual arrangements and economic harm resulting from a reduction in the Class III and IV minimum prices are the same type of alleged harm *Benson* founding inadequate. *See Benson,* 236 F.2d at 722 ("Mere loss of income in consequence of the action of Government or economic disadvantage, by itself, constitutes *damnum absque injuria,*" and "there is no certainty of any such loss, [as the FMMO] prescribes merely minimum prices."). There is nothing in the adjusted make allowances to prevent Plaintiffs from contracting to charge whatever price in excess of the minimum that the market will bear. Plaintiffs have also failed to demonstrate that they will suffer concrete harm as a result of the *method* by which the Secretary adjusted the make allowance. Plaintiffs' "loss" argument is belied by the extraordinarily high farm milk prices that have recently evolved in response to higher feed and fuel costs, and the remarkably high profits realized by many of the Plaintiffs. *See* USDA, Econ. Research Serv., *available at* http://www.ers.usda.gov/Data/CostsAndReturns/testpick.htm. Plaintiffs have also failed to show that the Secretary's asserted failure to consider the factors they identify has resulted in the make allowances being at a higher level than they would otherwise have been. *See Getty Images News Servs. v. Dep't of Def.*, 193 F.Supp.2d 112, 123 (D.D.C.2002) (relevant comparison for irreparable harm is between challenged system and one that comports with requirements asserted by plaintiffs). Plaintiffs are unable to make a convincing case for harm, much less irreparable harm.

iii. Balance of Harms

USDA maintains that there is a very real harm to the dairy industry as a whole if a preliminary injunction is granted. Every dollar that would be secured by Plaintiffs as a result of a preliminary injunction will be lost to manufacturers, who will end up paying higher minimum prices than they will under the new rule.

Any harm, which Plaintiffs have been unable to show, is offset by the substantial harm that Defendant-Intervenors and other handlers would incur if an injunction is granted. An injunction would cause Defendant-Intervenors and other handlers to lose revenue without recourse. The potential harm to Defendant-Intervenors and other handlers is no less real than the alleged harm to Plaintiffs and other producers. Indeed, the USDA recognized the harm that the status quo was causing handlers when it found that emergency conditions existed. *See* 71 Fed.Reg. at 67,477.

Dairy processors arguably stand to lose $14.5 million per month, or $173.7 million a year. These damages represent real, unrecoverable losses, not merely a possible reduction in hoped-for future revenue. The Secretary has determined that the status quo presents a serious threat to the industry as a whole. *See* 73 Fed.Reg. at 35,330. Balancing the harms of interested parties, Plaintiffs have not made a convincing argument that their alleged harm would be greater than the dairy industry as a whole.

iv. Public Interest

The public interest is served by ensuring the health and viability of the dairy industry. "[T]he purpose of the milk marketing scheme is to maximize the benefit to the largest number of producers, rather than to minimize a potential negative impact on a handful of producers." *White Eagle Coop. Ass'n v. Johanns,* 396 F.Supp.2d 954, 961 (N.D.Ind.2005). USDA's economic analysis found that fluid milk prices, whether for school lunches or home cereal use, will be reduced unless the FMMO takes effect. Plaintiffs, unlike handlers, are not constrained by regulation in their ability to charge more for milk to recover higher costs. This Court agrees with USDA that there is "no significant public interests that weigh in favor of granting" extraordinary relief. *Bridgewater Dairy*, 2007 WL 634059 at *8.

III. CONCLUSION

Accordingly, Plaintiffs' Motion for Preliminary Injunction is **DENIED.** Any request to stay this order will be denied for all of the reasons stated in this memorandum. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

73 Fed.Reg. 35306 June 20, 2008

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1000

[Docket No. AMS–DA–07–0026; AO–14–A77, et al.; DA–07–02–A]

Milk in the Northeast and Other Marketing Areas; Tentative Partial Final Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreements and Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; tentative partial final decision.

SUMMARY: This tentative partial final decision proposes to adopt changes to the manufacturing cost allowances and the butterfat yield factor used in Class III and Class IV product-price formulas applicable to all Federal milk marketing orders on an interim basis. A separate decision regarding the collection of manufacturing cost information, the use of an energy cost adjustor and providing for a cost add-on feature to Class III and Class IV product-pricing formulas will be addressed in a separate decision. This tentative partial decision requires determining if producers approve the issuance of the amended orders on an interim basis.

* * *

Discussion and Findings

This proceeding offered a wide array of proposals aimed at changing FMMO end-product pricing formulas used to establish classified prices in all orders. The original 19 proposals noticed range from abandonment of the current product-price formulas used to compute minimum Class III and Class IV prices to proposals that seek a variety of changes to the product-pricing formulas including manufacturing cost factors (make allowances), yield factors, technical factors, and authority to separate a portion of manufactured product sales prices from what otherwise is used to establish subsequent raw milk prices. The record of this proceeding encompassed a total of 12 hearing days over a 6-month period from February through July, 2007 and consists of more than 3000 pages of testimony, plus 78 exhibits and 10 post hearing briefs. The diversity of proposals considered indicates a lack of consensus within the dairy industry concerning how the Federal order program should set minimum milk prices in general and specifically how the many features of the product-price formulas should be altered.

Proponents for increasing make allowances have requested that regardless of the method adopted, USDA should omit a recommended decision and immediately adopt higher make allowances for butter, NFDM, cheese and dry whey because manufacturing costs have increased since the implementation of the current make allowances. The proponent from Agri-Mark for example, provided direct testimony that electricity and other fuel costs in cheese making had increased for plants operated by the cooperative. NMPF's proposed use of BLS energy cost data for an energy cost adjustor for make allowances as sought by Proposal 17 (addressed in a separate decision) provided reinforcement of the continued and rapid increases in those energy costs. Proposal 2, advanced by Agri-Mark, seeking to formally regularize the methodology for updating manufacturing cost data, and Proposal 20, advanced by Dairylea, to establish a cost add-on also are addressed in a separate decision.

Proponent witnesses representing Leprino, Twin County, and IDFA provided specific and general information that also support concluding that energy, transportation, labor and packaging costs for manufacturing processors have increased since the current make allowances became effective in March 2007. As pointed out by IDFA, because make allowances account for manufacturing costs in the Class III and Class IV price formulas but do not change as those costs change, increasing make allowances is the only reasonable way by which those increased costs can be recovered.

The ability of a manufacturer to offset cost increases are limited by the level of make allowances in the Class III and Class IV price formulas. Manufacturing processors are charged the FMMO minimum price for producer milk used to produce Class III and Class IV products. However, plant manufacturing cost increases may not be recovered because Class III and Class IV product-price formulas use make allowances that are fixed regardless of market conditions and change only by regulatory action. Simply put, when manufacturing cost increases result in costs higher than those provided by the formula make allowance factors, the value of milk used to make those products may be overvalued.

Product-price formulas are relied upon to establish the minimum class prices of raw producer milk used to make Class III and Class IV products, which in turn establish Class I and Class II prices. The product-pricing formulas use market prices collected by NASS for cheddar cheese, Grade AA butter, and dry whey to set a minimum price for Class III milk and NFDM and Grade AA butter to set a minimum price for Class IV milk. No competitive pay price series currently exists that can be relied upon to establish a price for raw milk nationally. While some proponents look to the CME, the futures prices of the CME use the FMMO minimum class prices as the starting points for Class III and Class IV milk futures contracts.

In the absence of competitive pay price series, product-price formulas for cheese, dry whey, NFDM and butter serve as the only practical basis from which the value of raw producer milk used in their production can be derived. A raw milk value is, in part, derived from NASS collecting and aggregating weekly reported sales price data from manufacturers who produce and market these commodity products and are presented in the NASS Dairy Product Price Survey.

The Class III and Class IV product-price formulas, among other factors, use the market prices of the manufactured products from which make allowance factors are subtracted. The remaining value, when converted to a milk equivalent basis, is the value of raw milk. Accordingly, the accuracy of deriving the minimum value of raw milk is dependent on the accuracy of the commodity sale prices reported and in large part the accuracy of the manufacturing costs factors, or make allowance factors, that are used in the pricing formulas.

The Agri-Mark proposal, Proposal 1, seeks to change make allowances used in the Class III and Class IV product formulas by relying on manufacturing cost data contained in the record of this proceeding by combining such data for plants outside of California with the most current manufacturing cost data published by the CDFA.[1] The 2-sets of manufacturing costs for cheese, NFDM, dry whey, and butter would be combined on a weighted average basis in a manner consistent with the development of the current make allowances used in determining Class III and Class IV prices. Other proponents seek to use the most recently available publications of the CDFA.[2] This method was used in earlier rulemakings to develop make allowances used in the product-price formulas.[3] [4]

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[1] Official Notices are taken of amendments to make allowances and all related documentation by the State of California in the Determinations, Findings, Conclusions and Order of the Secretary of Food and Agriculture, November 20, 2007, by the Office of the California Secretary of Agriculture. *See* http://www.cdfa.ca.gov/dairy/dairy_hearings_matrix.html, and http://www.cdfa.a.gov/dairy_hearings.html, and Summary of Weighted Average Manufacturing Costs, Butter, Nonfat Dry Milk, Cheddar Cheese, and Dry Whey Powder, Released September 18, 2007; *See* http://www.cdfa.ca.gov/dairy/pdf/manufcostexhibit2006.pdf.

Opponents of increasing make allowances argue a number of points – that they are already set at too high a level, that dairy farmer production costs also have increased significantly due to higher energy and feed costs, that processors should look beyond asking dairy farmers to receive less for their milk by charging more for manufactured products, and that make allowance increases should be made only when all dairy farmer production costs are captured in their milk pay price. These are not valid arguments for opposing how make allowances should be determined or what levels make allowances need to be in the Class III and Class IV product-pricing formulas. The record demonstrates that current make allowance levels are not reflective of the costs manufacturers incur in processing raw milk into the finished products of cheese, butter, NFDM and dry whey.

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[2] Ibid.

[3] Official notice is taken of 67 FR 67906 November 7, 2002, and 68 FR 7063, February 12, 2003, final decision and final rule respectively, and 66 FR 54064, 65 FR 76832.

[4] Official notice is taken of 71 FR 67467, November 22, 2006, 71 FR 78333, December 29, 2006, as well as hearing testimony, exhibits, and post hearing briefs for the hearing and hearing continuations originally noticed in 71 FR 545, January 5, 2006, and related materials concerning make allowances and dairy product manufacturing costs, and published for the convenience of the public on the USDA, AMS Dairy Programs Web site at http://www.ams.usda.gov/dairy.

Additionally, the Class III and Class IV product-price formulas establish derived classified prices for producer milk that are used nationally in all Federal milk orders. When dairy farmer production costs exceed the value for which products are sold in the marketplace, no source of revenue from the marketplace is available to cover those costs.

In the aggregate, the costs of producing milk are reflected in the supply and demand conditions for the dairy products. When the supply of milk is insufficient to meet the demand for Class III and Class IV products, the prices for these products increase as do regulated minimum milk prices paid to dairy farmers because the milk is more valuable and this greater milk value is captured in the pricing formulas. Dairy farmers face no regulatory minimums in their costs and face no regulated minimum payment obligation in the way that regulated handlers must pay dairy farmers for milk.

It is reasonable to conclude that the make allowances used in the Class III and Class IV product-price formulas should be updated to reflect changes in the costs manufacturers incur in producing cheese, butter, dry whey, and NFDM. It is necessary to reflect changes in manufacturing costs so that with the prevailing market prices for manufactured products, minimum Federal order classified prices can be set. In the record of this proceeding, evidence demonstrates that the manufacturing costs of producing cheese, dry whey, NFDM and butter have increased since the implementation of current make allowances on an interim basis and during the 6-month period when this proceeding occurred.[5]

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[5] Ibid. Official notice is taken of 72 FR 36341, July 3, 2007.

7 U.S.C.A. § 608c

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C.A. § 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Terms – Milk and its products

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

> **(A)** Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and

subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat

[TABLE OMITTED]

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time., [(e) omitted] and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but not limited to –

> **(i)** providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;
>
> **(ii)** handling on specific days quantities of milk that exceed the quantities needed by handlers; and
>
> **(iii)** transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

(K)(i) Notwithstanding any other provision of law, milk produced by dairies –

> **(I)** owned or controlled by foreign persons; and
>
> **(II)** financed by or with the use of bonds the interest on which is exempt from Federal income tax under section 103 of Title 26;
>
> shall be treated as other-source milk, and shall be allocated as milk received from producer-handlers for the purposes of classifying producer milk, under the milk marketing program established under this chapter. For the purposes of this subparagraph, the term "foreign person" has the meaning given such term under section 3508(3) of this title.

(ii) The Secretary of Agriculture shall prescribe regulations to carry out this subparagraph.

(iii) This subparagraph shall not apply with respect to any dairy that began operation before May 6, 1986.

(L) Providing that adjustments in payments by handlers under paragraph (A) need not be the same as adjustments to producers under paragraph (B) with regard to adjustments authorized by subparagraphs (2) and (3) of paragraph (A) and clauses (b), (c), and (d) of paragraph (B)(ii).

(M) Minimum milk prices for handlers

(i) Application of minimum price requirements

Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

(ii) Covered milk handlers

Except as provided in clause (iv), clause (i) applies to a handler of Class I milk products (including a producer-handler or producer operating as a handler) that –

(I) operates a plant that is located within the boundaries of a Federal order milk marketing area (as those boundaries are in effect as of April 11, 2006);

(II) has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a milk marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases; and

(III) is not otherwise obligated by a Federal milk marketing order, or a regulated milk pricing plan operated by a State, to pay minimum class prices for the raw milk that is used for such dispositions or sales.

(iii) Obligation to pay minimum class prices

For purposes of clause (ii)(III), the Secretary may not consider a handler of Class I milk products to be obligated by a Federal milk marketing order to pay minimum class prices for raw milk unless the handler operates the plant as a fully regulated fluid milk distributing plant under a Federal milk marketing order.

(iv) Certain handlers exempted

Clause (i) does not apply to –

(I) a handler (otherwise described in clause (ii)) that operates a nonpool plant (as defined in section 1000.8(e) of title 7, Code of Federal Regulations, as in effect on April 11, 2006);

(II) a producer-handler (otherwise described in clause (ii)) for any month during which the producer-handler has route dispositions, and sales to other plants, of packaged fluid milk products equaling less than 3,000,000 pounds of milk; or

(III) a handler (otherwise described in clause (ii)) for any month during which –

(aa) less than 25 percent of the total quantity of fluid milk products physically received at the plant of the handler (excluding concentrated milk received from another plant by agreement for other than Class I use) is disposed of as route disposition or is transferred in the form of packaged fluid milk products to other plants; or

(bb) less than 25 percent in aggregate of the route disposition or transfers are in a marketing area or areas located in one or more States that require handlers to pay minimum prices for raw milk purchases.

(N) Exemption for certain milk handlers

Notwithstanding any other provision of this section, no handler with distribution of Class I milk products in the marketing area described in Order No. 131 shall be exempt during any month from any minimum price requirement established by the Secretary under this subsection if the total distribution of Class I products during the preceding month of any such handler's own farm production exceeds 3,000,000 pounds.

(O) Rule of construction regarding producer-handlers

Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

(6) Terms – Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

> **(A)** Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.
>
> **(B)** Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or

both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

> **(i)** Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.
>
> **(ii)** Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage

of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);

(I) establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

> **(i)** By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in

the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.

(12) Cooperative association representation

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler and review

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be *in* accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A)(i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

(A) Applicability to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders.

(B) Supplemental rules of practice

(i) In general

Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall issue, using informal rulemaking, supplemental rules of practice to define guidelines and timeframes for the rulemaking process relating to amendments to orders.

(ii) Issues

At a minimum, the supplemental rules of practice shall establish –

(I) proposal submission requirements;

(II) pre-hearing information session specifications;

(III) written testimony and data request requirements;

(IV) public participation timeframes; and

(V) electronic document submission standards.

(iii) Effective date

The supplemental rules of practice shall take effect not later than 120 days after the date of enactment of this subparagraph, as determined by the Secretary.

(C) Hearing timeframes

(i) In general

Not more than 30 days after the receipt of a proposal for an amendment hearing regarding a milk marketing order, the Secretary shall –

(I) issue a notice providing an action plan and expected timeframes for completion of the hearing not more than 120 days after the date of the issuance of the notice;

(II)(aa) issue a request for additional information to be used by the Secretary in making a determination regarding the proposal; and

(bb) if the additional information is not provided to the Secretary within the timeframe requested by the Secretary, issue a denial of the request; or

(III) issue a denial of the request.

(ii) Requirement

A post-hearing brief may be filed under this paragraph not later than 60 days after the date of an amendment hearing regarding a milk marketing order.

(iii) Recommended decisions

A recommended decision on a proposed amendment to an order shall be issued not later than 90 days after the deadline for the submission of post-hearing briefs.

(iv) Final decisions

A final decision on a proposed amendment to an order shall be issued not later than 60 days after the deadline for submission of comments and exceptions to the recommended decision issued under clause (iii).

(D) Industry assessments

If the Secretary determines it is necessary to improve or expedite rulemaking under this subsection, the Secretary may impose an assessment on the affected industry to supplement appropriated funds for the procurement of service providers, such as court reporters.

(E) Use of informal rulemaking

The Secretary may use rulemaking under section 553 of Title 5, to amend orders, other than provisions of orders that directly affect milk prices.

(F) Avoiding duplication

The Secretary shall not be required to hold a hearing on any amendment proposed to be made to a milk marketing order in response to an application for a hearing on the proposed amendment if –

> **(i)** the application requesting the hearing is received by the Secretary not later than 90 days after the date on which the Secretary has announced the decision on a previously proposed amendment to that order; and
>
> **(ii)** the 2 proposed amendments are essentially the same, as determined by the Secretary.

(G) Monthly feed and fuel costs for make allowances

As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall –

> (i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;
>
> (ii) consider the most recent monthly feed and fuel price data available; and
>
> (iii) consider those prices in determining whether or not to adjust make allowances.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer referendum

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 $^2/_3$ per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.